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# FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

# FEDERAL COMMUNICATIONS COMMISSION

***James H. Quello, Chairman**

**Sherrie P. Marshall**

**Andrew C. Barrett**

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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-23**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-7900 |
| Table of Allotments, | RM-7989 |
| FM Broadcast Stations. | |
| (Hazard, Hyden, Jackson and London, Kentucky)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: January 22, 1993; Released: February 8, 1993**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 1372 (1992), issued in response to a petition for rule making filed by Ethel Huff ("Huff"), permittee of Station WYGE(FM), Channel 223A, London, Kentucky, requesting the substitution of Channel 223C3 for Channel 223A at London, and the modification of her construction permit (BPH-880817MH) to specify the higher class channel. In order to accomplish the upgrade at London, the *Notice* also proposed the substitution of Channel 223A for Channel 284A at Hazard, Kentucky, and the modification of Station WJMD(FM)'s license to specify Channel 223A; and the substitution of Channel 284A for Channel 222A at Hyden, Kentucky, and the modification of Station WZQQ(FM)'s license to specify Channel 284A. An *Order to Show Cause* was issued to Hazard Broadcasting Services, licensee of Station WJMD(FM), Channel 284A, Hazard, Kentucky, and Joey L. Dick, licensee of Station WZQQ(FM), Channel 222A, Hyden, Kentucky, directing the respective licensees to demonstrate why their license should not be modified to specify operation Channel 223A and Channel 284A, accordingly.

2. In response to the *Notice*, Huff filed a counterproposal requesting the substitution of Channel 222C2, rather than Channel 222C3, for Channel 223A at London, Kentucky, and the modification of her construction permit to specify operation on Channel 222C2. In order to accommodate this proposal, Huff also requested the substitution of Channel 250A for Channel 222A at Hyden, Kentucky, and the modification of Station WZQQ(FM)'s license to specify Channel 250A; and the substitution of Channel 293A for Channel 249A at Jackson, Kentucky, and the modification of Station WJSN(FM)'s license to specify Channel 293A.[2] Hazard Broadcasting Services, licensee of Station WJMD(FM), Hazard, file opposing comments and reply comments.[3] An *Order to Show Cause*, 7 FCC Rcd 6826 (1992), was issued to Intermountain Broadcasting Co., Inc. ("Intermountain"), licensee of Station WJSN(FM), Channel 249A, Jackson, Kentucky, directing the licensee to demonstrate why its license should not be modified to specify operation on Channel 293A in lieu of Channel 249A. Intermountain filed reply comments. Huff filed reply comments and comments restating her intention to apply for Channel 222C2, if allotted.

3. Huff in her counterproposal states that the substitution of Channel 222C2 for Channel 223A at London, would provide additional reception service to nearly a quarter million persons in more than an 8,500 square mile area, which represents an increase of 78% in area and 92% in population above those that would have resulted from the C3 upgrade. Huff also states that the Class A substitution will enable Station WJSN(FM), Jackson, and Station WZQQ(FM), Hyden, to operate as 6 kilowatt facilities. Huff states that she will reimburse the licensees of Stations WJSN(FM) and WZQQ(FM) for all reasonable costs in changing their channels as required by Commission policy.

4. The licensee of Station WZQQ(FM) filed no response to the *Order to Show Cause* why its license should not be modified. Accordingly, pursuant to Section 1.87 of the Commission's Rules, it is deemed to have consented to the channel change. Intermountain filed comments objecting to the channel substitution on the grounds that the change would result in costly technical changes and administrative expenses in changing frequencies.

5. In consideration of the above, we believe the public interest would be served by substituting Channel 222C2 for Channel 223A at London, Kentucky, since it could provide the community with a wide coverage area FM service. We believe the public interest would also be served by the substitution of Channel 250A for Channel 222A at Hyden, Kentucky, and the substitution of Channel 293A for Channel 249A at Jackson, Kentucky, to accommodate the London upgrade and to provide the communities of Hyden and Jackson, Kentucky, with expanded FM service. Channel 222C2 can be allotted to London in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.9 kilometers (2.4 miles) northwest,[4] in order to avoid a short-spacing to Station WDEF(FM), Channel 222C, Chattanooga, Tennessee. Channel 250A can be allotted to Hyden in compliance with the Commission's minimum distance separation requirements at Station WZQQ(FM)'s current transmitter site,[5] with a site restriction of 1.2 kilometers (0.8 miles) northwest. Channel 293A can be allotted to Jackson in compliance with the Commission's minimum distance separation requirements at Station WJSN(FM)'s current transmitter site,[6] with a site restriction of 1.4 kilometers (0.9 miles) southwest.

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[1] The community of Jackson, Kentucky, has been added to the caption.

[2] Public Notice of the counterproposal was given May 14, 1992, Report No. 1890 (RM-7989).

[3] Huff's counterproposal does not contemplate changes at Hazard. The counterproposal has been accepted. Therefore, comments in reference to a Hazard, Kentucky, channel substitution are now moot and will not be discussed.

[4] The coordinates for Channel 222C2 at London are North Latitude 37-09-12 and West Longitude 84-06-56.

[5] The coordinates for Channel 250A at Hyden are North Latitude 37-10-14 and West Longitude 83-22-49.

[6] The coordinates for Channel 293A at Jackson are North Latitude 37-32-46 and West Longitude 83-23-42.

6. As for Intermountain's objections to the Jackson channel substitution, we note that Huff has stated that she will reimburse the licensees of Stations WJSN(FM) and WZQQ(FM) for all reasonable costs in changing their channels as required by Commission policy. We will require Huff to reimburse these licensees for the reasonable costs associated with changing frequencies consistent with the guidelines stated in *Circleville and Columbus, Ohio,* 8 FCC 2d 159 (1967).

7. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WYGE(FM) to specify operation on Channel 222C2 at London, Kentucky. We are also modifying the license for Station WZQQ(FM) to specify operation on Channel 250A at Hyden, Kentucky, and the license for Station WJSN(FM) to specify operation on Channel 293A at Jackson, Kentucky.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 25, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Hyden, Kentucky | 250A |
| Jackson, Kentucky | 293A |
| London, Kentucky | 222C2 |

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WYGE(FM), London, Kentucky, IS MODIFIED to specify operation on Channel 222C2 in lieu of Channel 223A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WYQQ(FM), Hyden, Kentucky, IS MODIFIED to specify operation on Channel 250A in lieu of Channel 222A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the station authorization except the channel as specified above. Any other changes, except for those so specified under Section 73.1260 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1260 of the Rules, PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the require Communications Act of 1934, as amended, the license of Station WJSN(FM), Jackson, Kentucky, IS MODIFIED to specify operation on Channel 293A in lieu of Channel 249A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the station authorization except the channel as specified above. Any other changes, except for those so specified under Section 73.1260 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1260 of the Rules, PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

12. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Ethel Huff, permittee of Station WYGE(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

13. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensees of Station WZQQ(FM), and Station WJSN(FM).

Joey L. Dick
P.O. Box 181
Stinnett, KY 40868
(Licensee of Station, WZQQ(FM))

Intermountain Broadcasting Co., Inc.
1024 College Avenue
Jackson, KY 41339
(Licensee of Station WJSN(FM))

14. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Ethel Huff, proposing the substitution of Channel 223C3 for Channel 223A at London, Kentucky, the substitution of Channel 223A for Channel 284A at Hazard, Kentucky; and the substitution of Channel 284A for Channel 222A at Hyden, Kentucky, IS DISMISSED (RM-7900).

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-162**

In the Matter of

Amendment of Section 73.202(b), RM-8032
Table of Allotments,
FM Broadcast Stations.
(Norwood, New York)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: January 22, 1993; Released: February 8, 1993**

By the Chief, Allocations Branch:

1. At the request of Renard Communications Corp. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 5002 (1992), proposing the allotment of Channel 241A to Norwood, New York, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 241A to Norwood since an interest has been expressed in providing the community with its first local FM service. Channel 241A can be allotted to Norwood in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.4 kilometers (3.3 miles) north to avoid a short-spacing to Station WVNC, Channel 244A, Canton, New York.[1] While the allotment would be short-spaced to Stations CBOC-FM, Channel 238A, Cornwall, Ontario, Station CJFM-FM, Channel 240C1, Montreal, Quebec, and Station CFMK-FM, Channel 242B, Kingston, Ontario, Canada, use of Channel 241A at Norwood will not result in any prohibited interference. Canadian concurrence in the allotment of Channel 241A at Norwood, as a specially negotiated allotment, has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 25, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Norwood, New York | 241A |

4. The window period for filing applications will open on **March 26, 1993,** and close on **April 26, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 241A at Norwood are North Latitude 44-47-51 and West Longitude 74-58-12.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-140**

In the Matter of

Amendment of Section 73.202(b), RM-8015
Table of Allotments,
FM Broadcast Stations.
(Grants, New Mexico)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: January 22, 1993; Released: February 8, 1993**

By the Chief, Allocations Branch:

1. At the request of Don R. Davis ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 5231 (1992), proposing the substitution of Channel 264C2 for Channel 265A at Grants, New Mexico, and the modification of Station KZNM's license to specify operation on the higher powered channel. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were filed.

2. We believe the public interest would be served by substituting Channel 264C2 for Channel 265A at Grants since it could enable Station KZNM to expand its coverage area. Channel 264C2 can be allotted to Grants in compliance with the Commission's minimum distance separation requirements at Station KZNM's licensed transmitter site.[1] As proposed, we will also modify Station KZNM's license to specify Channel 264C2 in lieu of its present Class A channel.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 25, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Grants, New Mexico | 264C2, 279C, 288C |

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Don R. Davis for Station KZNM, IS MODIFIED to specify operation on Channel 264C2, in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Don R. Davis, licensee of Station KZNM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 264C2 at Grants are North Latitude 35-07-09 and West Longitude 107-54-08.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-242**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8087 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Leavenworth, Washington) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: January 22, 1993; Released: February 8, 1993**

By the Chief, Allocations Branch:

1. At the request of Ron Murray, d/b/a Murray Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 6817 (1992), proposing the allotment of Channel 249A at Leavenworth, Washington, as its first local aural transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 249A at Leavenworth, Washington, since it would provide the community with its first local aural transmission service. Channel 249A can be allotted to Leavenworth in compliance with the Commission's minimum distance separation requirements at the petitioner's requested site with a site restriction of 1.2 kilometers (0.7 miles) east of the community.[2] Since Leavenworth is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 25, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Leavenworth, Washington | 249A |

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to the licensee of Station KYSN(FM), as follows:

Stephenson Broadcasting, Inc.
960 Valley Mall Parkway
East Wenatchee, Washington 98802

5. The window period for filing applications will open on **March 26, 1993,** and close on **April 26, 1993.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] In response to the *Notice*, petitioner provided an affidavit verifying the statements in its petition for rule making as required by Section 1.52 of the Commission's Rules.

[2] The coordinates for Channel 249A at Leavenworth are North Latitude 47-35-32 and West Longitude 120-38-35.

As indicated in the *Notice*, the Leavenworth proposal is short-spaced to the presently licensed operation of Station KYSN(FM), Channel 249A, East Wenatchee, Washington, at coordinates 47-22-52 and 120-17-16, and thus dependent upon Station KYSN(FM) moving to Channel 266A in accordance with the modification provisions set forth in the *Report and Order* in MM Docket No. 91-114. *See* 6 FCC Rcd 6476 (1991). Since the Leavenworth allotment proposal is dependent upon the grant of a license for Station KYSN(FM) on Channel 266A, the issuance of a license on Channel 249A may be withheld until Station KYSN(FM) is authorized to operate on its new channel. The licensee of Station KYSN(FM) will be served with a copy of this *Report and Order*.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-174**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8035 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Grants, New Mexico) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: January 27, 1993; Released: February 8, 1993**

By the Chief, Allocations Branch:

1. At the request of Philip D. Vanderhoof ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 5231 (1992), proposing the allotment of Channel 224C2 to Grants, New Mexico, as the community's fourth local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 224C2 to Grants since an interest has been expressed in providing the community with an additional local aural service. Channel 224C2 can be allotted to Grants in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 25, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Grants, New Mexico | 224C2, 264C2, 279C, 288C |

4. The window period for filing applications will open on **March 26, 1993,** and close on **April 26, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In the *Notice*, petitioner was advised that he had not complied with the verification requirement set forth in Section 1.52 of the Rules and thus was requested to correct the oversight in his comments. Petitioner did file timely comments but the comments did not include a statement verifying that the information contained in the petition was correct to the best of his knowledge. While the failure to comply with Section 1.52 of the Rules can result in the dismissal of the petition, we believe that it would be inappropriate to do so in this instance since the channel can be allotted to Grants without adversely affecting any other allotment or proposed allotment and no objection to the proposal has been received.

[2] The coordinates for Channel 224C2 at Grants are North Latitutde 35-09-06 and West Longitude 107-51-36.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-15**

In the Matter of

Amendment of Section 73.202(b), RM-8167
Table of Allotments,
FM Broadcast Stations
(Rupert, Idaho)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: January 27, 1993; Released: February 8, 1993**

**Comment Date: April 1, 1993**
**Reply Comment Date: April 16, 1993**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed on behalf of Inland Broadcast Company, ("petitioner"), requesting the substitution of Channel 223C for Channel 223A at Rupert, Idaho, and the modification of Station KNAQ(FM)'s construction permit to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 223C for Channel 223A at Rupert since it could provide the community with a wide coverage area FM service. Channel 223C can be allotted to Rupert in compliance with the Commission's minimum distance separation requirements at the petitioners desired transmitter site with a site restriction of 31.8 kilometers (19.7 miles) southeast of the community.[1] As requested, we propose to modify Station KNAQ(FM)'s construction permit to specify Channel 223C. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 223C at Rupert or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Rupert, Idaho | 223A | 223C |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 1, 1993,** and reply comments on or before **April 16, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lester W. Spillane
1040 Main Street
Suite 208
Napa, California 94559
(Attorney for Inland Broadcast Company)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 223C at Rupert are North Latitude 42-20-06 and West Longitude 113-36-16.

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

NATIONAL TELEPHONE EXCHANGE, INC.,
Complainant,

v. File No. E-91-114

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

**ORDER**

**Adopted: January 27, 1993; Released: February 8, 1993**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 9, 1991, National Telephone Exchange, Inc. (National) filed the above-captioned formal complaint against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On January 22, 1993, however, National filed a motion to dismiss the complaint with prejudice stating that the parties have reached a full and complete settlement and there is no further reason to proceed in this matter.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that National's Motion to Dismiss with Prejudice IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

CITADEL COMMUNICATIONS COMPANY, LTD.
(Assignor)

and File No. BALCT-890829KF

ACT III BROADCASTING OF BUFFALO, INC.
(Assignee)

For Assignment of the License of
Television Station WUTV,
Buffalo, New York

## MEMORANDUM OPINION AND ORDER

**Adopted: January 19, 1993; Released: February 9, 1993**

By the Commission: Commissioners Duggan and Barrett dissenting and issuing separate statements.

1. The Commission has before it for consideration a petition for permanent waiver or other special relief filed by Act III Broadcasting, Inc. (ACT III), the parent company of ACT III Broadcasting of Buffalo, Inc. (ACT III-Buffalo), licensee of television station WUTV, Channel 29 (Fox), Buffalo, New York, and of ACT III Broadcasting of Rochester, Inc. (ACT III-Rochester), licensee of television station WUHF, Channel 31 (Fox), Rochester, New York. ACT III is currently operating the stations, whose Grade B contours overlap, under a temporary waiver of Section 73.3555(a)(3) of the Commission's Rules (the duopoly, or contour-overlap rule), which generally proscribes common ownership of two television stations whose Grade B contours overlap. The petition now seeks consent for a permanent waiver of the duopoly rule. An "opposition" to the petition was filed by WROC Associates (WROC), licensee of WROC-TV, Channel 8 (CBS), Rochester, New York, and a "response" to the petition was filed by Buffalo Management Enterprises Co., Inc. (Buffalo Management), licensee of WIVB-TV, Channel 4 (CBS), Buffalo, New York. ACT III responded to both pleadings.

## BACKGROUND

2. On June 19, 1990, the Commission approved the assignment of the license of WUTV, Buffalo, New York, from Citadel Communications Company, Ltd. to ACT III-Buffalo, a wholly owned subsidiary of ACT III, which is also the parent company of ACT III-Rochester, the licensee of WUHT, Rochester, New York. *Citadel Communications Company Ltd.*, 5 F.C.C. Rcd 3842 (1990). The Grade B contour of station WUTV overlaps with that of WUHT, and the Commission conditioned grant of the assignment application upon ACT III's divestiture of WUHF within 12 months from the date of the consummation of the sale. *Id.* at 3845.[1] Additionally, in granting the temporary waiver, the Commission relied on the tripartite pledge of ACT III to insure the independent operation of the stations during the waiver period: (1) that WUTV and WUHF would refrain from joint and combination sales; (2) that WUTV and WUHF would employ separate national sales representatives firms in both the United States and in Canada; and (3) that WUTV and WUHF would not engage in joint acquisition of syndicated, sports or other forms of entertainment programming for broadcast on the two stations. *Id.* at 3844.

3. In the interim, however, ACT III's attempts to divest WUHF were unavailing. ACT III noted, in its request for an extension of the temporary waiver, that despite its dispatch of sales information packages to 33 interested parties and its enlistment of six brokers to promote the sale of the station, the weakened economy and tightened credit markets thwarted several interested buyers, including two potential minority purchasers, from obtaining financing. *ACT III Broadcasting of Rochester, Inc.*, 6 F.C.C. Rcd 7479 (1991). Noting the good faith attempts of ACT III to divest WUHF and stating that a forced sale would serve only to harm the public and the licensee with no offsetting benefits to the public, the Commission granted ACT III a 12-month extension.[2] Moreover, the decision to extend the divestiture period again turned on the three-part pledge of ACT III, reaffirmed in the waiver request, to operate WUTV and WUHF independently. *Id.* at 7479. This extended divestiture period was subsequently tolled by the Commission pending the outcome of the rule making proceeding concerning television ownership. *Review of the Commission's Regulations Governing Television Broadcasting (Review of Television Ownership)*, 7 F.C.C. Rcd 4111, 4115 n.32 (1992).

## DUOPOLY WAIVER REQUEST

4. ACT III now seeks relief from the divestiture order and requests a permanent waiver of the duopoly rule. First, it contends that Commission precedent supports its request. Conceding that the overlap area of the Grade B contours of WUTV and WUHF is not *de minimis*, as determined by the Commission in granting ACT III a temporary waiver, *Citadel Communications Company, Ltd.*, 5 F.C.C. Rcd at 3844, ACT III nevertheless argues that the overlap area is "insubstantial" and that the percentage of each station's Grade B contour population within that area falls within the range of those permitted by the Commission.[3] The overlap area, ACT III states, encompasses 301 square kilometers (116 square miles) and 41,753 persons, constituting 11.3 percent of WUTV's Grade B contour area and 3.1 percent

[1] ACT III originally requested a permanent waiver of Section 73.3555(a)(3), but later amended its application to request a temporary waiver of the rule.

[2] The extension was to run 12 months from the expiration of the original waiver period, June 28, 1991.

[3] ACT III cites *Weigel Broadcasting Co.*, 4 F.C.C. Rcd 6200 (1989)(1.3 percent and 5.8 percent of the overlapping stations' Grade B contour populations); *Silver King Broadcasting of Vineland, Inc.*, 2 F.C.C. Rcd 324 (1986), *recon. denied sub nom. Press Broadcasting Co.*, 3 F.C.C. Rcd 6640 (1988), *aff'd sub nom. Office of Communications of the United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990)(2.2 percent and 5.7 percent); *Taft*

of its population and 10.7 percent of WUHF's Grade B contour area and 4.3 percent of its population. The largely rural overlap area, which, ACT III notes, lies outside any Standard Metropolitan Statistical Area, will be served by the Grade B or better signals from 10 full service television stations and one low power television station, in addition to WUTV and WUHF.[4] This substantial diversity of voices compares favorably to past Commission cases, ACT III contends, and is enhanced by 35-channel cable systems, which are available to nearly all of the population in the overlap area. Moreover, ACT III asserts, there is no threat of undue economic concentration in the overlap area because neither WUTV nor WUHF solicit advertising in communities in that area. And, according to the affidavits of the stations' general managers, neither station intends to seek advertising revenue in the overlap area in the future as the area "is largely irrelevant to our business."

5. As with past cases in which the Commission has granted waivers of the duopoly rule, ACT III asserts, the two stations operate in separate markets, each with distinct economies, advertisers and service needs. WUTV is licensed to Buffalo, New York, the nation's 37th largest television market, while WUHF is licensed to Rochester, New York, located approximately 70 miles northeast of Buffalo and the nation's 74th largest market. The differences in the economic bases, according to the 1991 A.C. Nielsen Test Market Profiles, as cited in the affidavit of WUHF's general manager, are evidenced by the demographics of the two markets: 55 percent of Rochester's work force is "white collar" versus 50 percent of Buffalo's; 20 percent of Rochester's population age 25 and above has a college degree versus 14 percent of Buffalo's; and 34 percent of the heads of households in Rochester are age 50 and above versus 40 percent in Buffalo.

6. Consequently, declares Ronald Inman, a senior vice president of ACT III, these demographics yield varying sources and proportions of advertising revenues. Forty-four percent of WUHF's revenues, Inman states, derive from local sales, while only 17 percent of WUTV's revenues do so. And, Inman notes, while the remaining 56 percent of WUHF's advertising revenues are generated from U.S. national or regional sales made through U.S. sales firms, only 28 percent of WUTV's revenues are so generated, with the remaining 55 percent derived from sales made through Canadian sales representation firms. As for the local revenues, Inman indicates that all of those of WUHF and the majority of those of WUTV[5] are obtained from businesses located within their respective ADIs or Grade A contour areas. Although one percent of WUTV's local revenues came from businesses located in WUHF's Grade A or Grade B contour area, this percentage is misleading, according to ACT III, in that it is attributable to clients with substantial business presence in the Buffalo ADI but whose advertising decisions are made in Rochester offices for administrative convenience. None of WUHF's local revenues were derived from businesses located in WUTV's Grade A or Grade B contours.

7. The best measure of the stations' separate identities and operations, however, ACT III contends, are the programming schedules of WUTV and WUHF, which are designed to serve the preferences of the individual markets. Both stations are Fox network affiliates, airing 11 weekday hours and 5.5 weekend hours of the same Fox programming, which, ACT III notes, is beyond the scheduling control of the local station manager. Of WUTV's remaining 109 weekday programming hours and 97 of WUHF's weekday hours, ACT III observes, only 2.5 hours are scheduled with the same syndicated programs at the same times. And, of WUTV's remaining 38.5 weekend programming hours and 38 of WUHF's weekend hours, only three hours are scheduled with the same programming at the same times. Although, about one quarter of WUHF's broadcast week contains syndicated programs also broadcast on WUTV, according to a weekly sample schedule submitted by ACT III,[6] these similar programming inventories, ACT III argues, stem not from collusive acquisition of programming, but from the limited nationwide inventory of successful syndicated programming available to stations. As a consequence, ACT III argues, independent stations throughout the country, not only WUTV and WUHF, may schedule the same syndicated programming. Present and future collaboration between WUTV and WUHF on programming and operational strategies, according to the affidavits of the stations' general managers, is eschewed. Furthermore, despite the simulataneous airing of Fox programming on WUTV and WUHF, their separate affiliation agreements with Fox, ACT III contends, are not structured so as to promote entrance into each other's markets. Indeed, each station's compensation arrangement, according to ACT III, depends upon the individual station's performance only within its own ADI, with no regard for any other market performance. In terms of audience share, ACT III notes, WUTV ranks fourth in the Buffalo area of dominant influence (ADI), which has six commercial television stations, and WUHF ranks last in its ADI, which has four commercial stations.

8. Additionally, ACT III asserts, grant of its waiver request would not compromise the fundamental policies served by the rule, and the benefits to be achieved by its proposal would be in the public interest for two reasons. First, the economies of scale and cost savings derived from common ownership are, ACT III contends, "particularly

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*Broadcasting, Inc.*, 7 F.C.C. Rcd 2854 (1992)(4.3 percent and 11.4 percent); and *Capital Cities Communications, Inc.*, 59 R.R. 2d 451 (1985)(12.4 percent and 24.7 percent).

[4] Six of the ten full-service stations are licensed to Buffalo: WGRZ-TV, Channel 2 (NBC); WIVB-TV, Channel 4 (CBS); WKBW-TV, Channel 7 (ABC); WNYB-TV, Channel 49 (Ind.); WNED-TV, Channel 17 (PBS); and WNEQ-TV, Channel 23 (PBS). The remaining four are licensed to Rochester: WHEC-TV, Channel 10 (NBC); WOKR, Channel 13 (ABC); WROC-TV, Channel 8 (CBS); and WXXI-TV, Channel 21 (PBS).

[5] Fifty-nine percent of WUTV's local revenues, according to Inman, derived from businesses located within either the station's ADI or its Grade A contour area, and the remaining 41 percent of its local revenues derived from sponsored programming placed by business headquarters located outside the Buffalo and Rochester areas. Moreover, Inman notes, only one percent of WUTV's local revenues originated from businesses located in the area between the station's Grade A and Grade B contour.

[6] This proportion of duplicative programming is consistent with that calculated by the petitioner, WROC. According to an affidavit by the general manager of WROC-TV, Rochester, 25.3 percent of the WUHF 160-hour broadcast week contains syndicated programs that duplicate WUTV programming, based upon program schedules listed in current editions of TV Guide.

important to UHF independent stations," such as WUTV and WUHF, which "are often at a revenue and cost disadvantage." And, although WUTV and WUHF are autonomous, ACT III argues, the resulting operating efficiencies at the group level ultimately serve the public interest, enabling a group owner, such as ACT III, to initiate a local newscast for Rochester on WUHF. Without a permanent duopoly waiver, however, ACT III notes, it would be unwilling and even unable to invest in local news programming for Rochester given the long-term financial return inherent in local news operations, as well as the difficulties of securing financing for such an endeavor given the uncertain status of ACT III's ownership of WUHF. Second, according to ACT III, while a tolled divestiture order would inhibit its investment in new operations for WUHF, forced divestiture could seriously disrupt the station's operations, leading to a decline in the quality of service to Rochester. Moreover, ACT III argues, forced divestiture in an era of a depressed television station market, especially with regard to UHF stations, could adversely affect the group owner's overall financial health and the ability of all of its stations to serve the public interest.[7]

9. In sum, ACT III asserts, not only is the overlap area in this case within the range of those found in Commission precedent, but other factors considered by the Commission in analyzing waiver requests, diversity of voices in the overlap area, the separateness of the markets, the autonomy with which each operates its station, and the public interest benefits to be achieved, also comply with past decisions. Most relevant to the waiver request here, ACT III contends, is the Commission's most recent grant of a permanent waiver of the duopoly rule in *Pegasus Broadcasting of Augusta, Georgia, Inc.* (*Pegasus Broadcasting*), F.C.C. 92-527, released December 1, 1992. In that case, according to ACT III, the traditional factors mentioned above were satisfied, and the Commission granted a duopoly waiver allowing the common ownership of two strong, network-affiliated, VHF stations. In contrast, ACT III argues, "WUTV and WUHF are two financially and competitively less secure UHF, independent Fox stations.

10. In response to the permanent waiver request, WROC argues that because the facts upon which the Commission ruled in granting the initial divestiture order in *Citadel Communications Company Ltd.*, 5 F.C.C. Rcd 3842 (1990), have not changed, the Commission should deny the permanent waiver request now before it. In fact, WROC contends, program diversity in the overlap area has diminished since ACT III's original request in 1990, based upon the sheer fact that ACT III is currently the licensee of both WUTV and WUHF. Further, WROC notes that despite ACT III's contention that only several hours of syndicated programming are aired at the same time, the stations' broadcast of duplicative Fox network programming, as well as of approximately 40 weekly hours of duplicative syndicated programming, results in a total of 34 percent duplication of WUTV's programming on WUHF. Because this level of program duplication has been maintained during the Commission's program acquisition restrictions on ACT III, WROC contends that "one can only wonder what level of duplication would exist absent those restrictions."

11. As for the potential for WUTV and WUHF's combined advertising, WROC lists major regional advertisers in Buffalo and Rochester which advertise their products and services in both markets. This "crossover" business, alleges the general manager of WROC-TV, accounts for 31 percent of the total local billing of all Rochester market television stations, while 75 percent of all national business is crossover business. Removal of the current Commission restrictions on ACT III regarding joint selling and combination rates, WROC-TV's general manager asserts, could result in a revenue increase to the two stations of $1.124 million per year.

12. Any public interest benefits effected by common ownership of WUTV and WUHF are, WROC contends, speculative: ACT III's promise to initiate local newscasts on WUHF is "vague" and entitled to no Commission consideration, while ACT III's portrayal of forced divestiture of WUHF as wreaking economic havoc upon the financial health of its other stations is "undefined" and "unspecified."

13. Finally, WROC asserts that the Commission's decision in *Pegasus Broadcasting* is distinguishable from ACT III's circumstances in two ways. First, WROC maintains that "the important element" in *Pegasus Broadcasting* was that the assignor seeking consent to sell a station it had acquired as a creditor in a debt restructuring plan was operating the subject station under a divestiture order. Thus, according to WROC, the Commission "appears to have taken pity" on the seller, and thereby consented to sale of that station to a purchaser whose ownership also necessitated a duopoly waiver. ACT III, WROC argues, has articulated no analogous basis for grant of a waiver. Second, the overlap area in *Pegasus Broadcasting* was found by the Commission to be within the sphere of influence of only one of the two stations, WROC notes, while viewing of stations in the three counties located in the overlap area of WUTV and WUHF is evenly divided.[8] Moreover, WROC contends that Commission grant of a permanent waiver here would prejudge the outcome of the pending rule making proceeding concerning television ownership, *Review of Television Ownership*, 7 F.C.C. Rcd 4111 (1992), and would set a waiver standard based upon Grade B contours that would "effectively eviscerate the [duopoly] rule."

14. Buffalo Management, on the other hand, states in its "Response" to ACT III's request for permanent waiver that it takes no position on whether the Commission should grant a permanent waiver to ACT III pending the outcome of the rule making proceeding. However, Buffalo Manage-

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[7] ACT III also controls: WNRW, Channel 45 (Fox), Winston-Salem, North Carolina; WRGT-TV, Channel 45 (Fox), Dayton, Ohio; WTAT-TV, Channel 24 (Fox), Charleston, South Carolina; WZTV, Channel 17 (Fox), Nashville, Tennessee; WRLH-TV, Channel 35, Richmond, Virginia; and WVAH-TV, Channel 11 (Fox), Charleston-Huntington, West Virginia.

[8] A.C. Nielsen, WROC notes, specifies all three counties, Orleans, Genesee, and Wyoming, as within the Buffalo Designated Market Area, and Arbitron considers Orleans County to be within the Rochester ADI. According to figures cited by WROC, based upon A.C. Nielsen Co., 1992 County Coverage Summary/County Study, 54.2 percent of the off-air viewing of Orleans is of Buffalo television stations and 45.8 percent is of Rochester stations, 54.8 percent of the off-air viewing of Genesee is of Buffalo stations and 45.2 percent is of Rochester stations, and 65.7 percent of the off-air viewing of Wyoming is of Buffalo stations and 34.3 percent is of Rochester stations.

ment urges the Commission to condition such a waiver upon the continued observance of ACT III's three-part pledge concerning the operational independence of WUTV and WUHF, as originally made in the initial application for a temporary waiver in *Citadel Communications Company, Ltd.*

## DISCUSSION

15. The ultimate objective of the duopoly rule, as well as the other multiple ownership rules, is to foster economic competition in broadcasting and to promote diversification of programming sources and viewpoints. *Multiple Ownership Rules*, 22 F.C.C. 2d 306, 307 (1970), *recon. granted in part*, 28 F.C.C. 2d 662 (1971). In adopting the duopoly rule's fixed standard of a prohibited overlap of Grade B service contours, the Commission sought to provide a greater degree of certainty than under its prior rule, which prohibited the common ownership of television stations serving "substantially the same service area." *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, 1476 n.1, *recon. granted in part*, 3 R.R. 2d 1554 (1964). However, the Commission maintained a policy of "flexibility," noting that the rule could be waived in cases where its application would be "inappropriate." *Id.* at 1479 n.12; *John Hay Whitney*, 28 F.C.C. 2d 736, 752 (1971). Accordingly, the Commission has granted waivers of the duopoly rule where signal overlap is *de minimis*, *see, e.g., Hubbard Broadcasting, Inc.*, 2 F.C.C. Rcd 7374 (1987), or where the public interest to be gained from waiving the rule would be greater than any detrimental effects resulting from the overlap. *See, e.g., Capital Cities Communications, Inc.*, 59 R.R. 2d 451, 465 (1985)(service to separate and distinct markets, and availability of multiple signals available in overlap area). As for the *de minimis* overlap standard, our past waiver cases have characterized this as an overlap area representing less than one percent of both the area and the population of the Grade B contour of each station. *E.g., Hubbard Broadcasting, Inc.*, 2 F.C.C. Rcd at 7374; *Capital Cities Communications, Inc.*, 59 R.R. 2d at 464 n.21; *KSOO-TV, Inc.*, 43 F.C.C. 2d 879, 880 (1973). And, with regard to the second standard, in which the public interest benefits resulting from waiver of the rule are weighed against any detrimental effects of the overlap, we have considered several factors, including the extent of the overlap, the number of media voices in the overlap area, the distinctiveness of the respective markets, the independence of the stations' operations with regard to programming and advertising, and the concentration of economic power. Whether grant of the waiver would permit new service to an underserved area or would allow for the acquisition of a station with financial difficulties had been, as WROC contends, pivotal factors in our balancing process.

16. However, in *Pegasus Broadcasting*, F.C.C. 92-527 at 6, we noted that in balancing these factors today when considering a waiver request, "we are not constrained to limit our analysis solely to the factors underlying the balance struck when the rule was originally adopted or to factors previously considered in waiver cases." This narrow shift in our evaluation of duopoly waiver requests was predicated upon the principle that as the video marketplace becomes increasingly competitive,[9] as it is today, the potential diversity and competition detriments from overlapping signal contours generally decrease. *Id.*

17. We note at the outset that the factors in ACT III's proposal present a more favorable case than did that of the applicants in *Pegasus Broadcasting*, our most recent grant of a duopoly waiver.[10] Accordingly, we decline to accept WROC's two-pronged attempt to distinguish that case from the one before us. First, we relied on the orientation of the viewership in the overlap area in *Pegasus Broadcasting* merely as further evidence that the common owner in that case would not achieve an undue concentration of economic power. *Id.* at 7. Here, although viewership in the overlap area is nearly evenly split between the Buffalo and Rochester ADIs, we are satisfied, as discussed below, that ACT III will not achieve an undue concentration of economic power, particularly in light of the small overlap area and population. Second, WROC's characterization of our grant of a permanent waiver in *Pegasus Broadcasting* as an act of "sympathy" to the assignor operating under a temporary divestiture order, also fails. Our reliance upon the pending divestiture order in that case served as further support for our conclusion that any detriment resulting from the overlap was negligible and that the balance of interests tilted in favor of granting the request for the duopoly waiver. In the case before us, as discussed below, we conclude that any detriments from the WUTV-WUHF overlap is minimal and that the public interest factors cited, certainty of ownership and the initiation of a local news program for Rochester, outweigh any such detriments.

18. Moreover, ACT III's proposal is commensurate with those found in past Commission cases in which we granted duopoly waiver requests. Although the overlap area of the Grade B contours of WUTV and WUHF is not *de minimis*, as we determined in ACT III's initial request for a temporary waiver,[11] it is not so large as to require a finding that the two stations "serve substantially the same area." *Capital Cities Communications, Inc.*, 59 R.R. 2d 451, 465 (1985)(population in overlap area comprised 12.4 percent of the population of one station and 24.7 percent of the other). Indeed, the size of, and the population within, the

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*See Review of Television Ownership*, 7 F.C.C. Rcd at 4114.

[10] The two stations in *Pegasus Broadcasting* were two strong, network-affiliated VHFs whose Grade B overlap area was composed of 3,074 square kilometers (1,187 square miles) and 96,769 persons, compared with the two fourth-ranked UHF stations here whose overlap is composed of 301 square kilometers (116 square miles) and of 41,753 persons. Moreover, a minimum of six, and as many as 12, television stations provided a Grade B or better signal to any given location in the overlap area in *Pegasus Broadcasting*, 10 television stations provide such a signal to the entire overlap area of the ACT II stations. And, the cable penetration rate in the counties comprising the overlap area in *Pegasus Broadcasting* averaged 42 percent, while the cable penetration rate in this case is virtually 100 percent. Finally, the Buffalo and Rochester markets are as distinctive here as were the two markets in *Pegasus Broadcasting*.

[11] ACT III attempts to resurrect the terrain shielding argument that it asserts we "minimized," but did not reject, in *Citadel Communications Company, Ltd.* at 3845 n.3. Although we agreed that some minor shadowing may exist in the overlap area, we noted that ACT III's calculations were overestimated. Accordingly, we now expressly reject ACT III's reduced overlap figures, based on its shadowing calculations, which would reduce the overlap area to 3.2 percent of each station's Grade B contour.

overlap area are within the range of past waiver cases. *E.g., Taft Broadcasting Partners Limited Partnership,* 7 F.C.C. Rcd 2854, 2855 (1992)(overlap area encompassed 19.2 percent of the area and 11.4 percent of the population of one station's Grade B contour and 18 percent of the area and 4.3 percent of the population of the other station's). Moreover, the number of Grade B television signals in the overlap area, as well as the nearly complete cable penetration there, assure a diversity of voices to viewers within the area.

19. Although, as WROC indicates, approximately one-third of WUHF's programming, including Fox network and syndicated fare, is the same as that broadcast on WUTV, there is no evidence that separate ownership of the two stations would diminish this percentage. Further, we rely on the representations of ACT III, as set forth in the declarations of the stations' general managers, that there will be no cooperation between WUTV and WUHF with regard to programming and/or operational strategies. We are also persuaded that the distinctiveness of the Buffalo and Rochester markets, as evidenced by their varying demographics and their substantial gap in ADI size, is not conducive to programming collaboration. As to WROC's fear of ACT III's undue concentration of economic power, we note that not only are both WUTV and WUHF ranked fourth in terms of audience share in their respective markets,[12] but both are UHF stations, characteristically disadvantaged, as we have noted in the past, by weaker signal propagation and higher operating costs.[13] *See, e.g., Review of Television Ownership,* 7 F.C.C. Rcd at 4115. And, WROC's litany of "crossover" regional advertisers which advertise in both Buffalo and Rochester is nothing more than that: WROC has failed to allege that WUTV and WUHF jointly solicit advertising from these businesses or that any of these businesses in fact advertise on ACT III's stations. However, although we do not condition grant of a permanent waiver here upon ACT III's three-part pledge, as Buffalo Management has requested, we now rely on its renewed representations that it will continue to abide by those three restrictions, as enumerated in paragraph 2 above, so as to operate the stations independently. Thus, while Act III will maintain a separation between the operations of the two stations, common ownership will result in a degree of efficiency and economies of scale that should improve service to the public.

20. While common ownership of WUTV and WUHF might result in a negligible diminution of diversity and of competition, we believe that this is outweighed by the public interest benefits to be achieved by ACT III's proposal. We believe, in light of ACT III's attempts to divest WUHF, *see ACT III Broadcasting of Rochester, Inc.,* 6 F.C.C. Rcd at 7479, that the continued uncertain ownership status of that station is not in the public interest. Indeed, we note, as ACT III represents, that a permanent waiver would remove ACT III's reluctance to make the substantial investment required to initiate a local news program on WUHF. ACT III states that it will work with Fox to develop a local half-hour or one-hour late evening newscast for Rochester, whose commencement date, ACT III notes, hinges on Fox's development of network news services. Consequently, we are persuaded that granting ACT III a permanent waiver is in the public interest as well as consistent with the objectives of the multiple ownership rules. Our decision here is based solely upon factors developed in past duopoly waiver cases. Accordingly, WROC's suggestion to the contrary, the result in this case neither portends nor prejudges the outcome of the pending rule making in *Review of Television Ownership.*

21. Accordingly, IT IS ORDERED That the petition to deny ACT III's Petition for Permanent Waiver or Other Special Relief, filed by WROC Associates, and the response, filed by Buffalo Management Enterprises Co., Inc., ARE DENIED.

22. IT IS FURTHER ORDERED That the request by ACT III for a permanent waiver of Section 73.3555(a)(3) IS GRANTED.

23. The staff of the Mass Media Bureau will send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**DISSENTING STATEMENT**
**OF**
**COMMISSIONER ERVIN S. DUGGAN**

**In re Application of Citadel Communications Company, Ltd. and ACT III Broadcasting of Buffalo, Inc., for Assignment of the License of Television Station WUTV, Buffalo, New York**

When this matter came before the Commission last December, I supported ACT III Broadcasting's request for a 12-month extension of the deadline for divestiture of WUHF(TV). I characterized that extension, however, as "a narrow and limited action" and stated that I would be "extremely reluctant to grant a further extension of this waiver." *Act III Broadcasting of Rochester, Inc.,* 6 FCC Rcd 7479 (1991).

As I suggested then, I was sympathetic to the facts supporting the original temporary waiver. Indeed, some of the specific characteristics of this case--- *e.g.,* the area of Grade B overlap, the high cable penetration in the overlap area, the size of the affected population, and the competitive

[12] A comparison of Arbitron sign-on/sign-off market share for the two stations in February 1990, the last complete period prior to ACT III's consummation of its purchase of WUTV, and in November 1992 is instructive. In February 1990, WUTV was ranked fourth in its market with an audience share of four, and remained in fourth position in November 1992 with an audience share'of six. Similarly, in February 1990, WUHF was ranked fourth in its market with an audience share of 10, and maintained that rank in November 1992 with a market share of nine. The top three stations in each market, all ABC, CBS or NBC affiliates, had market shares ranging from a low of 18 to a high of 27.

[13] Section 73.3555(d)(3)(i) of our Rules assumes that even the audience reach of UHF stations is only one-half of that of VHF stations serving the same ADI.

conditions in the Rochester and Buffalo television markets -- are less troubling than those in other recent cases. *See, e.g., Taft Broadcasting Partners Limited Partnership*, 5 FCC Rcd 2854 (1992) (Commissioner Duggan concurring). Nevertheless, I continue to be concerned about waiving away the television duopoly rule, particularly under the significantly relaxed standard established in *Pegasus Broadcasting of Augusta, Georgia, Inc.*, FCC 92-527, released December 1, 1992, *recon. pending*, and in light of our ongoing proceeding examining the rule itself. *Review of Television Ownership*, 7 FCC Rcd 4111 (1992).

I am not closed to the idea of modifying certain aspects of the duopoly rule. I continue to believe, however, that the rulemaking ultimately is the proper forum for making such a change and that, in the interim, we must clarify and narrow our standard for waiving the duopoly restriction.

## DISSENTING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

**In Re: ACT III Broadcasting of Buffalo, Inc.**

When I supported the Commission's efforts to reexamine the video market place[1] and later the broadcast televisions ownership rules,[2] I did not agree to modify these rules through our waiver process while the rulemaking proceeding was pending. The Commission in December 1992 began down this path of rulemaking through the waiver process by changing the waiver standards in its grant of a duopoly waiver to Pegasus Broadcasting, Inc.[3] I dissented in that case. While I recognize that the facts involved in this case are not as egregious, I must dissent here based both on the facts presented and my concern for the continuation of the Commission's practice of granting these permanent duopoly waivers while the Commission has a pending rulemaking proceeding on this issue.

The Commission's rulemaking proceeding sought comments from interested parties as to the public interest benefits and detriments of modifying the multiple ownership rule. As I previously noted, a major portion of that *NPRM* concerned modification of the television duopoly rule.[4] Parties have expended a great deal of time, money and energy to assist the Commission in this rulemaking process. Rather than use this valuable input from the public, the Commission has determined that it will modify the rule through the individual wavier process.[5]

The basis of my assertion that the Commission has circumvented the rulemaking process is the fact that there was no need to grant a *permanent* duopoly waiver in this case or in *Pegasus*[6] ACT III Broadcasting already had been granted a waiver of the duopoly rule *pending the outcome of the television ownership proceeding*.[7] This waiver permitted ACT III to operate both stations pending the rulemaking proceeding or until it found a buyer for one of the stations. The only reason ACT III filed for a permanent waiver is the fact that the Commission changed the standards for grant of a permanent waiver of the television duopoly rules. But for our modification of the waiver standards in *Pegasus*, it is not clear ACT III would have been granted a permanent duopoly wavier.

Before *Pegasus* the Commission granted duopoly waivers where (1) the overlap of the Grade B signals is *de minimis*;[8] (2) there would be improved service to an unserved or underserved area; or (3) the action would preserve a failing station.[9] Utilizing the new standards for waiver, the Commission has determined that even absent any of the prior justifications for waiver, it should grant a permanent duopoly waiver to ACT III. In this regard, the overlap in this case is not *de minimis*. Second, neither market can be considered underserved. Finally, ACT III does not request a waiver based on a failing station rationale. Contrary to the conclusions reached in the Order, I do not find the stated public interest justifications for grant of a permanent duopoly waiver to ACT III outweigh the Commission's concerns with the promotion of diversity and competition.[10]

Perhaps, based on the record developed in our rulemaking proceeding, the Commission may determine that public interest considerations justify modifications of the television duopoly rule. Until that time, however, I do not believe it appropriate to prejudge the outcome of the rulemaking by granting numerous waivers of the duopoly rules under the *Pegasus* standards. Accordingly, I must dissent.

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[1] *Notice of Inquiry* in MM Docket NO. 91-221, 6 FCC Rcd 4961 (1991).

[2] *Notice of Proposed Rulemaking* in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992).

[3] *Pegasus Broadcasting*, 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett).

[4] *See* Dissenting Statement of Commissioner Barrett.

[5] In these situations, the courts have long favored modifications of rules through the rulemaking process rather than through the case-by-case waiver approach. *See, e.g., Securities and Exch. Comm. v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *Wisconsin Gas Co. v. F.E.R.C.*, 770 F.2d 1144, 1166 (D.C. Cir. 1985).

[6] *See* Dissenting Statement of Commissioner Barrett.

[7] NPRM, 7 FCC Rcd at 4115 n.32.

[8] *See, e.g., Storer Communications, Inc.*, 59 R.R.2d 611 (1985); *Hubbard Broadcasting, Inc.*, 2 FCC Rcd 7374 (1987); *KSUU-TV, Inc.*, 43 FCC2d 879 (1973).

[9] *See, e.g., Capital Cities Communications, Inc.*, 59 R.R.2d 451 (1985) [underserved areas]; *Silver King Broadcasting of Vineland, Inc.*, 2 FCC Rcd 324 (1986), *recon. denied; Press Broadcasting Co.*, 3 FCC Rcd 6640 (1988), *aff'd sub nom., Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990) [financially weak television outlets]; *See also Taft Broadcasting Partners Limited Partnership*, 7 FCC Rcd 2854 (1992) [station on the verge of bankruptcy].

[10] The Order provides as justification for the waiver the "certainty of ownership and the initiation of a local news program for Rochester." *See ACT III Broadcasting of Buffalo, Inc.* at ¶ 17. These factors could just as easily be obtained by requiring divestiture of the stations or permitting ACT III to continue under its waiver pending the outcome of the rulemaking proceeding. In particular, the initiation of a local news program for Rochester might make the station a more valuable property if ACT III is required to sell the station.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 92-119**

In the Matter of

Revocation of License of

SANDRA V. CRANE
Amateur Radio Station
N6TFO
Marina Del Ray, California

and

Suspension of License of

SANDRA V. CRANE
Amateur Extra Class
Radio Operator License

and

Revocation of License of

CHARLES P. PASCAL
Amateur Radio Station
WB6CIY
Carson City, Nevada

and

Suspension of License of

CHARLES P. PASCAL
Amateur Extra Class
Radio Operator License

**Appearances**

*George L. Lyon, Jr.*, *Marjorie K. Conner*, and *Martin J. Barab* on behalf of Sandra V. Crane and Charles P. Pascal; and *Eric Malinen* and *Thomas D. Fitz-Gibbon*, on behalf of the Chief, Private Radio Bureau.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN**

**Issued: February 2, 1993; Released: February 9, 1993**

**Preliminary Statement**

1. Sandra V. Crane (Crane) and Charles P. Pascal (Pascal), respondents in the above captioned proceeding, by their counsel, pursuant to Section 1.1501 et. seq. of the Commission's Rules, apply for an award of fees and costs pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. Section 504. The Chief, Private Radio Bureau, by his attorney, opposes grant of the relief sought under the EAJA.[1]

**Findings Of Fact**

2. By Order to Show Cause and Suspension Order released April 24, 1992, the Chief, Private Radio Bureau ordered the respondents to show cause why the radio station licenses shown in the caption should not be revoked, and suspended their Amateur Extra Class Operator licenses for the remainder of their terms.[2] The Order to Show Cause and Suspension Order designated the following issues:

(a) To determine whether the respondents willfully or repeatedly violated Section 97.17(e)[3] of the Commission's Rules in connection with examinations administered on August 4, August 24, or September 14, 1991, or on any combination of these dates.

(b) To determine whether respondent Sandra V. Crane willfully or repeatedly violated Section 97.17(e), 97.515(d),[4] or 97.517,[5] or any combination of these sections, of the Commission's Rules in connection with examinations administered on November 12, 1990, January 6, 1991, or April 12, 1991, or on any combination of these dates.

(c) To determine whether respondent Charles P. Pascal willfully violated Section 97.17(e) or 97.517, or both, of the Commission's Rules in connection with an examination administered on November 12, 1990.

(d) To determine whether each respondent is qualified to remain a Commission licensee.

(e) To determine whether one or both of the captioned radio station licenses should be revoked.

(f) To determine whether the suspension of each of the captioned operator licenses should be affirmed, modified, or dismissed.

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[1] Pending before the Presiding Judge are "Request For Award Under Equal Access To Justice Act" filed November 4, 1992 by Crane and Pascal; "Bureau's Reply To EAJA Application" filed December 4, 1992; and "Reply To Answer To Application For Award Under Equal Access To Justice Act" filed December 21, 1992 by Crane and Pascal.

[2] The suspension was held in abeyance, pending the outcome of this proceeding.

[3] Section 97.17(e) provides in pertinent part that no person shall obtain or attempt to obtain or assist another person to obtain or attempt to obtain, an operator license by fraudulent means.

[4] Section 97.515(d) provides in pertinent part that no Voluntary Examiner (VE) may administer an examination to a family member of the VE.

[5] Section 97.517 provides in pertinent part that no VE may administer or certify an examination by fraudulent means.

3. The respondents requested a hearing which was set for Washington, D.C. on September 29, 1992. Hearing conferences were held in Washington, D.C. on September 18, 23 and 24, 1992. The latter two sessions were "Admission Sessions" where the Bureau and Respondents identified their respective direct case exhibits and the Presiding Judge ruled on objections to receipt in evidence of such exhibits. On September 24, following a lunchtime recess, the parties' counsel announced on the record that they had reached a settlement.

4. On September 30, 1992, the parties filed a joint motion for approval of a Consent Agreement, "Consent Agreement," and a draft "Consent Order." The joint motion recited that approval of the Consent Agreement and issuance of the Consent Order was in the public interest. In this regard, the parties stated that the attached documents satisfactorily resolved the issues set forth in the Order to Show Cause Order and Suspension Order, eliminated the need for a hearing, and that no further enforcement or public benefit would be gained from this proceeding.

5. On October 1, 1992, the Presiding Judge issued a "Consent Order." See FCC 92M-987. Under the "Consent Order," the respondents agreed to a 3-month suspension of their Amateur Extra Class Operator licenses. Also, as a result of the suspension, the respondents lost their eligibility to be Voluntary Examiners within the Volunteer Examiner Coordination and Novice Class testing systems, a privilege both respondents had exercised in the past.[6] In addition the respondents agreed to

> the establishment of a "wall" between their teaching functions and the selection of volunteer examiners (VEs) to test their students. The VEs who administer examinations in conjunction with classes taught by or with the assistance of either respondent or in conjunction with classes at any radio school that either respondent is affiliated with must be selected by a "contact" VE designated by the American Radio Relay League (ARRL) or another Volunteer Examiner Coordinator having no affiliation with the respondents and approved by the Commission. Neither the respondents nor anyone connected with any school that the respondents are affiliated with shall have any role in selecting the "contact" VE or the administering VEs.[7]

## CONCLUSIONS

6. Section 1.1501 of the Rules which implements the EAJA provides for the award of attorney's fees and other expenses to an eligible party "when it prevails over the Commission, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust." The EAJA is applicable because the captioned proceeding sought to revoke licenses held by Crane and Pascal. In addition, Crane and Pascal meet the eligibility requirements denoted in Section 1.1504 of the Rules. In this regard, the Bureau does not contest the net worth statements of Crane and Pascal showing net worths substantially less than the allowable 2 million dollars.

7. However, while Crane and Pascal meet the conditions of eligibility, they have failed to meet their burden of demonstrating they are the prevailing parties in this proceeding. Parties may be considered prevailing parties for purposes of the EAJA "if they succeed on any significant issue in litigation which achieves some of the benefits sought in bringing suit." *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983). See also *Continental Web Press, Inc. v. NLRB*, 767 F.2d 321 (7th Ctr. 1985). This test was reaffirmed in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, _____, 109 S.Ct. 1486, 1492-93 (1989). In *Garland*, the Supreme Court held that "the touchstone of the prevailing party inquiry must be the alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.* at _____, 109 S. Ct. at 1493.

8. Crane and Pascal argue they are the prevailing parties because the consent order does not require the revocation of their amateur radio station licenses. The contention is without merit. It ignores what the Bureau sought in bringing this proceeding and what it achieved in settling this action. The Bureau alleged in its *Order to Show Cause and Suspension Order* (OSC) that Pascal and Crane were operators of an Amateur Radio School; that they gave instructions to students of the school prior to the administration of amateur service license examinations on certain specified dates; and that Pascal and Crane had information that they used to tailor the content of their instructions to include answers to all or most of the questions which were on the examinations. The OSC also alleged that Crane had improperly administered amateur service license examinations to her daughter.

9. In settling this action, Crane and Pascal agreed to a 3 month suspension of their Amateur Extra Class Operator licenses. Also, by agreeing to the suspension of their licenses, Crane and Pascal are no longer eligible to be Volunteer Examiners within the Volunteer Examiner Coordinator and Novice Class testing systems, a privilege both had exercised in the past. Most important, Crane and Pascal agreed to the establishment of a "wall" separating their teaching functions from the selection of volunteer examiners who test their students. This provision, which could not have been obtained by the Bureau except by settlement, obviated the Bureau's concern that the amateur service license examinations given to students were being compromised. It is thus clear that the Bureau achieved by settlement substantially all the benefits it sought in bringing this proceeding.[8] Crane and Pascal's retention of their amateur radio station licenses, a necessary consequence of settling this case and avoiding further litigation, is unimportant.[9] In this connection, in the joint motion for approval of consent agreement, Crane and Pascal agreed with the Bureau that the consent order satisfactorily resolved the issues and eliminated the need for a hearing and that no

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[6] Section 97.515(c) provides: "No person may be a VE if that person's amateur station license or amateur operator license has ever been revoked or suspended."

[7] Consent Order at 3, para. 3(f).

[8] It is axiomation that the law looks with favor upon settlements, as the Commission recognizes in its consent order rules. See Section 1.93 of the Rules.

[9] Even assuming the hearing had proceeded and resulted in the revocation of Crane and Pascal's amateur licenses, the Rules permit them to reapply for a new license one year after revocation. See Section 1.916 of the Rules.

further enforcement or public benefit would be gained from this proceeding. It is thus plain that Crane and Pascal have failed to satisfy either the *Hensley* or *Garland* tests and their claim that they are the prevailing parties cannot be sustained.[10] Their request for an award of fees and costs pursuant to the EAJA is denied.[11]

IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[12] the "Request For Award Under Equal Access To Justice Act" filed November 4, 1992 by Sandra V. Crane and Charles P. Pascal IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

[10] *SEC v. Conserv Corp.*, 908 F. 2d 1407, 1409, 1412-1413 (8th Cir. 1990) is instructive. In *Conserv*, the SEC filed suit alleging that Conserv and four of its officers, including Johnson, had engaged in securities law violations. Each of the defendants except Johnson consented to a permanent injunction against future violations while neither admitting nor denying the allegations. The SEC pursued its suit against Johnson. The SEC proceeded to trial and after the SEC completed its case in chief, the district court granted Johnson's motion to dismiss the action and granted EAJA relief. On appeal, the court agreed that Johnson was the prevailing party since the SEC achieved none of the relief it sought while Johnson obtained all that he sought in pursuing his defense. It also determined that Conserv did not prevail, pointing out that the SEC achieved its sought-for result even thought the dispute ended with Conserv's consent. Here, as in *Conserv*, by settlement through entry of a consent order, the Bureau has gained the public benefit which it sought through this enforcement proceeding.

[11] In light of this determination, it is unnecessary to reach the question whether the Bureau's position in this proceeding was "substantially justified."

[12] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 85-234**

In re Applications of

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|---|---|
| CHARISMA BROADCASTING CORPORATION | File No. BPCT-850207KG |
| ARLINGTON 68 TV, INC. | File No. BPCT-850418KZ |
| UNITED BROADCAST GROUP, LTD. | File No. BPCT-850419KE |
| SOUTHWEST COMMUNICATIONS, LTD. | File No. BPCT-850419KO |
| JOHNSON TELEVISION, LTD. | File No. BPCT-850422KG |
| BRISCOE BROADCASTING, LTD. | File No. BPCT-850422KH |
| METROPLEX COMMUNICATIONS, INC. | File No. BPCT-850422KP |
| SAMMY A. THORNTON | File No. BPCT-850422MR |
| NATIVE AMERICAN BROADCASTING LIMITED PARTNERSHIP | File No. BPCT-850422KU |

For Construction Permit for a New Television Station at Arlington, Texas

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 23, 1992; Released: February 9, 1993**

By the Commission:

1. Before the Commission for consideration are a Review Board Decision, *Charisma Broadcasting Corporation*, 6 FCC Rcd 3411 (1991), granting the application filed by Metroplex Communications, Inc. for a new UHF Television Station at Arlington, Texas; Applications for Review filed July 1, 1991 by Charisma Broadcasting Corporation, Arlington 68 TV, Inc., United Broadcast Group, Ltd., Southwest Communications, Ltd., Sammy A. Thornton and Native American Broadcasting Limited Partnership; and a Contingent Petition for Review filed July 31, 1991 by Metroplex;[1] and Oppositions filed July 15, 1991 by United, and July 16, 1991 by Charisma, Southwest, Native American and Metroplex. In an Order, *Charisma Broadcasting Corporation*, FCC 91I-68, released October 22, 1991, the General Counsel requested additional comments and submissions with respect to Metroplex's integration proposal. Statements were filed October 24, 1991 by Thornton, October 28, 1991 by Native American and October 29, 1991 by Charisma, Arlington 68, United and Southwest, and a Reply was filed November 8, 1991 by Metroplex.

2. The Applications for Review will be denied and we will affirm the grant of Metroplex's application. Further comment is warranted with respect to Metroplex's integration proposal, along with the integration proposals of several of the other applicants.

3. *Metroplex:* Although Metroplex's principals, Rosario Leal and Elizabeth Flores, testified that they would work full-time at the proposed station, they failed to quantify the hours they will work in their direct written testimony. In Metroplex's integration statement, which is part of the official record of this proceeding, and in responses to interrogatories, they both made 40 hours a week integration commitments. Relying in part on those documents, which were never placed in evidence, the Board credited Metroplex's integration proposal. Citing *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6318-19 (Rev. Bd. 1990), the Board concluded that Metroplex's failure to quantify its principals' integration proposals during the hearing is a "harmless technicality."

4. The Applications for Review argue that in *Vacationland Broadcasting Company, Inc.*, 97 FCC 2d 485, 492 (Rev. Bd. 1984) rev. den. FCC 85-275, released May 21, 1985 (subsequent history omitted), the Board announced that:

> in the future it will expect applicants to specifically state in their direct written cases the precise hour-per-week commitment proposed for each integrated principal. Failure to provide this information or substantial justification for its absence may lead to denial or diminution of the integration credit sought.

The losing applicants contend that the Board erred in relying on Metroplex's integration statement and answers to interrogatories because they were not in evidence. They also argue that the Board improperly relieved Metroplex of its burden of proof by relying on the fact that Leal and Flores were not cross-examined about their integration commitments. They further assert, citing *Deep South Broadcasting Co. v. FCC*, 347 F.2d 459 (D.C. Cir. 1965), that crediting Metroplex's integration commitment would deprive them of their rights to a full hearing on Metroplex's qualifications. In this regard, Charisma, Thornton and Arlington 68 argue that the General Counsel's

[1] Johnson Television, Ltd. and Briscoe Broadcasting, Ltd. did not file applications for review. Accordingly, the Review Board's Decision is final with respect to their applications.

request for comments concerning possible areas for cross-examination of Metroplex's proposed integration does not satisfy their rights to a full hearing.

5. Native American, United and Arlington 68 assert that, if Metroplex is allowed to perfect its integration showing, the Commission must vacate the Board's decision and remand this proceeding so that all of the applicants have a similar opportunity to correct defects in their own integration commitments. Finally, the other applicants argue that all applicants must specify the hours to be worked so that the Commission can make a numerical comparison of disparate integration proposals using the Herschman-Herfindahl Index (HHI) (*Omaha TV 15, Inc.*, 4 FCC Rcd 730, 734 (1989)). In this regard, they note that in connection with the Broadcast Station Annual Report, FCC Form 395-B, full-time employees include all employees working 30 or more hours a week, so that Metroplex's evidentiary showing of a "full-time" commitment can not be assumed to be for a 40 hour week.

6. Metroplex's principals' written testimony stated that they would work "full-time" at the proposed station. It argues that the parties have not impeached or otherwise shown how they would impeach that testimony. Thus, it asserts the record supports the credit awarded for its full-time integration proposal. It also argues that the language in *Vacationland* is permissive, i.e. it only holds that there "may" be a denial or diminution of integration credit. Noting that in *Kennebec Valley Television*, 2 FCC Rcd 1240, 1242 ¶ 9 (Rev. Bd. 1987), rev. den. 3 FCC Rcd 4522 (1988), the Board concluded that applicants could set forth their specific intentions concerning current employment in their prehearing ownership integration statements, Metroplex urges that applicants can similarly quantify their integration proposals. According to Metroplex, the Board in fact so expanded *Vacationland* in *Mableton* by holding that it would consider prehearing integration statements containing commitments to work a specific number of hours a week. Asserting that the other applicants had an opportunity to test its integration proposal, Metroplex argues that, by declining to conduct cross-examination or otherwise test its integration proposal, the other applicants relied on a overly restrictive, literal reading of *Vacationland* at their own risk.

7. We are overruling *Vacationland* to the extent that it may be read to require an applicant, whose integration proposal includes pledges to work 40 hours a week and who has made an unequivocal pledge to be integrated full-time, to quantify in its direct written case the specific number of hours to be worked. When an applicant proposes full-time integration and there is no evidence indicating that the applicant will not work 40 hours a week, requiring the applicant to quantify the hours in its direct written case is a meaningless technicality. In this regard, we note that the language in *Vacationland* was permissive, holding only that integration credit *may* be diminished or denied when an applicant fails to specify the specific number of hours that its principals will be integrated into the station. Moreover, the ruling in *Vacationland* was dicta; it established a prospective policy and it was not argued in the subsequent proceedings before the Commission. In addition, even the Board has previously rejected the parties' inflexible reading of the *Vacationland* policy. In *Mableton* the Board, following *Kennebec Valley*,[2] determined when a prehearing showing meets the specificity concerns expressed in *Vacationland*, an applicant will be permitted to conform its hearing exhibit to reflect its specific integration proposal even if the latter failed to specify the number of hours to be worked. Moreover, there is no ambiguity concerning the meaning of full-time integration. The Commission has consistently held that full-time integration is synonymous with 40 hours a week. See, for example, *Absolutely Great Radio*, 104 FCC 2d 1, 4 (1986), where the Commission awarded full-time credit for a commitment to work 40 hours a week, and half time credit for 20 hours a week. See also *Radio Greenbriar, Inc.*, 80 FCC 2d 107, 123 n.33 (Rev. Bd. 1980); *Flint Family Radio, Inc.*, 69 FCC 2d 38, 41 n.5 (Rev. Bd. 1977). Under these circumstances, we find no logical basis for requiring an applicant's principals to testify concerning the specific number of hours they will be employed at a station when their integration commitments specify 40 hour work weeks, they have testified that they will be integrated on a full time basis, and there is no reason to conclude that they will be involved less than 40 hours a week.

8. We also believe that the parties' reading of the *Vacationland* policy elevates form over substance and has led to the unwarranted gamesmanship and ambush tactics reflected in this proceeding. The applicants were on notice of Metroplex's prior statements and the stated intention of its principals to work 40 hours a week. They had the opportunity to cross-examine Metroplex's principals about their integration proposals. However, instead of taking steps to develop a complete record under which the Commission could resolve the designated issues, they appear to have held back in hopes of capitalizing on a technical, but meaningless gap in the record. The efficiency of the Commission's processes is best served by policies which encourage full consideration of all relevant matters during the hearing so that determinations are based on the applicants' actual qualifications rather than on a failure to compile a complete record, particularly when all of the parties are on notice of the facts at issue. Such apparent gamesmanship is inconsistent with our intent to expedite hearing proceedings as expressed in our hearing reform policy. *Comparative Hearing Process*, 6 FCC Rcd 157 (1990). In any event, the narrow reading of *Vacationland* put forward by the losing applicants is rejected and that reading will not be applied to applications now pending before the Commission.

9. In Metroplex's written direct case, Leal and Flores stated they would be integrated on a full-time basis. Metroplex's showing contains no variance, any limiting contingency, or any circumstance which would otherwise call into question their commitment to work at least 40 hours a week at the station. Moreover, Metroplex's non-hearing documents fully reflect its principals' intention to work 40 hours a week at the proposed station and the parties were on notice of their intentions. In this regard,

[2] Although the Board in *Kennebec Valley* characterized its *Vacationland* policy as a "go-no go evidentiary rule," that case was not decided until after Metroplex's principals had testified in this proceeding and, thus, it was not a factor in the competing applicants' litigation strategy in this case. In any event, we find nothing in *Kennebec Valley* that alters the nature of the Board's original holding in *Vacationland* that the policy is permissive, particularly given the Board's own recognition in *Kennebec Valley* that the applicant may address such matters by various means.

we note that none of the other applicants made a proffer of evidence that would impeach Metroplex's integration commitment.[3] Under these circumstances, we find that it would be overly harsh and unrealistic to refuse to credit Metroplex's integration proposal. To the extent that some of the other applicants urge that there should be a general reopening of the record in this case, we find no reason to do so given the clear direct testimony of Metroplex's principals that they will be fully integrated into the operation of the proposed station as reflected above.[4] Thus, there is no basis to allow the competing applicants to alter their integration proposals, long after the time for doing so as a matter of right has expired, by untimely submissions of evidence that are inconsistent with the current record.

10. The remaining arguments concerning Metroplex's integration proposal are without merit. As noted above, the record establishes that Metroplex's principals intend to work full-time at their proposed station. See Metroplex Ex. 3 and 4. Furthermore, Form 395-B has no relevance to integration proposals in comparative proceedings. *Flint Family Radio, Inc.*, 69 FCC 2d 38, 41 n.5 (Rev. Bd. 1977). Although the HHI requires a specification of exact hours so that a numerical comparison can be made for less than full-time integration proposals, it does not require such a specification for full-time proposals. In fact, the Commission's application of the HHI assumes, for comparative purposes, that full-time integration is 40 hours a week. Thus, Metroplex is entitled to 100 percent quantitative credit for its full-time integration proposal.[5]

11. *Arlington 68:* After the completion of the evidentiary hearing, Arlington 68 amended its application to show that its principal, Jo Ann Reyes, had become a candidate for election to the United States Congress. The Board agreed with the ALJ that her campaign for political office was inconsistent with her integration proposal. 6 FCC Rcd at 3413 ¶ ¶ 9-11. On July 11, 1990, after the proceeding was remanded on unrelated matters, Arlington 68 submitted a statement from Reyes asserting that she did not abandon her integration commitment because she never had a reasonable prospect of being elected. Citing *Deep South Broadcasting Co. supra, Lebanon Valley Radio, Inc.*, 24 RR 2d 586, 618 (Rev. Bd. 1972), and *A.C. Elliott, Jr.*, 59 FCC 2d 56, 59-60 (Rev. Bd. 1976), Arlington 68 argues that it was denied due process because it never had an opportunity to rebut the ALJ's adverse finding concerning Reyes' integration commitment.

12. It is both a long held and routinely applied principle that applicants seeking credit for ownership integration must demonstrate how they can accommodate their outside business and professional obligations with their specific integration proposals. *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952 ¶ 16 (Rev. Bd. 1988) (subsequent history omitted). Integration proposals will not be credited in the absence of an evidentiary showing that an applicant's existing commitment will not conflict with its integration proposal. *Washoe Shoshone Broadcasting, supra; Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 680-83 (Rev. Bd. 1986); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-871, rev. den. 2 FCC Rcd 2780, affirmed, No. 87-1256 (D.C. Cir. Mar. 11, 1988). It was therefore incumbent upon Arlington 68 to show that Reyes' intention to serve in Congress would not conflict with her integration proposal. Because she offered no such showing in conjunction with her report of the congressional campaign, Reyes' integration proposal thereby became contingent on her losing the election or, if elected, on her serving only one term. It is well established that the Commission will not credit an integration proposal where it is contingent on a future event. See *Northern Sun Corporation*, 100 FCC 2d 889, 890-91 (Rev. Bd. 1985) rev. den. FCC 86-135, July 26, 1986, where the Commission refused to credit the integration proposal of an applicant that was contingent on the Commission's denial of another application filed by that applicant. Therefore, because Reyes' integration proposal was dependent on the outcome of the congressional election, the Board properly rejected Arlington 68's claimed credit for integration.

13. The precedents cited by Arlington 68 do not support its argument that it was denied due process. Those proceedings involved the denial of opportunities to rebut documents benefiting competing applicants. In *Deep South*, the Court held that the Commission could not waive its technical rules without giving a party opposed to a requested waiver an opportunity to examine the basis for that waiver. In *Lebanon Valley*, the Board ruled that it could not rely on an engineering statement proffered after the hearing, when the competing applicants were not afforded an opportunity to test that statement during the hearing. Finally, in *A.C. Elliott*, the Board held that an applicant should be allowed to amend its application when it lacked notice of the Commission's requirements, and it authorized the Bureau to file comments concerning the amendment and to address the question of whether further hearings would be required. Here, the ALJ and the Board considered the 47

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[3] Despite the opportunity to do so, none of the competing applicants made any allegations of any conflict that would warrant less than full-time integration credit and, with the exception of Charisma, none even suggested questions to be posed for Metroplex's principals. As to Charisma's proposed examination, it appears that the matters that it now wishes to raise could and should have been pursued at the time of the parties' interrogatories in this proceeding. Finally, we reject any suggestion by the parties that they may have held back any questions of Metroplex because they believed it would inure to their benefit under *Vacationland*. The parties knew or should have known that *Vacationland* was a permissive standard and that the Commission had never specifically addressed the Board's pronouncement. Thus, the applicants simply chose to take their chances that the Commission would adopt their restrictive reading of *Vacationland* and lost.

[4] *Deep South* is not on point. Unlike that case, no new issue was raised or resolved by reference to facts only partially reflected in the record, the burden of proof and the burden of going forward with the evidence have always been on Metroplex, all parties in interest have been permitted to participate in all aspects of this matter and, thus, there has been a full and fair hearing on the integration question.

[5] In an Amendment filed on the B cut off-date, Metroplex specified that it was named Metroplex Media, Inc. Eight days later, the application was amended to show that it was incorporated as Metroplex Communications, Inc. United argues that Metroplex Communications did not exist on the B cut-off date and that acceptance of the amendment constituted a post-cut-off upgrading of the application. That argument is without merit. There is no showing of any change in the applicant's ownership and, thus, the ALJ properly accepted the amendment naming Metroplex Communications as the applicant. See *Evergreen Broadcasting Company*, 6 FCC Rcd 5599 ¶ 6 and 5606 n.9 (1991), citing *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 ¶ ¶ 13-14 (1988); *Coast TV*, 4 FCC Rcd 1786, 1788-89 ¶ ¶ 12-16 (1989).

C.F.R. § 1.65 statement filed by Arlington 68. That statement presented circumstances with respect to Arlington 68's integration proposal that were inconsistent with the effectuation of that proposal, and Arlington 68's failure to address the questions concerning its integration proposal at that time fully warranted the refusal to credit its integration proposal. The Commission is not required to reopen the record where Arlington 68 had an opportunity and failed to take timely steps to proffer any clarifying showing with respect to Reyes' campaign for Congress. *Continental Broadcasting, Inc. v. FCC*, 439 F.2d 580, 584 (D.C. Cir. 1971); *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 27 (D.C. Cir. 1941).

14. Reyes' post-hearing statement, however, even if considered,[6] would not eliminate the contingency raised by Arlington 68's amendment. Reyes asserts that she ran against an incumbent congressman whose party had won the seat by a wide margin in recent elections, that very few incumbent members of Congress are defeated for reelection, and that she entered the race only to give minority voters a credible candidate for whom they might cast their ballots. Although Reyes may well have believed it likely that she would be defeated, she was the nominee of a major political party, she was a plausible candidate and she received a significant number (36%) of votes. Arlington 68's integration proposal became contingent on her losing the election, an outcome that was not evident on the face of the amendment. In addition, Arlington 68 admits that most members of Congress are reelected. Thus, from the time that Reyes started her campaign for Congress, until she was defeated in the election, her race for Congress was facially inconsistent with her integration commitment and her effort to revitalize that commitment by virtue of her subsequent defeat was properly rejected because it would have constituted an impermissible post cut-off upgrading of Arlington 68's proposal. See *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 430-31 (Rev. Bd. 1983), rev. den. FCC 84-434, released September 9, 1984 (holding that applicants cannot benefit from post cut-off changes in their integration proposals).

15. We also reject Arlington 68's reliance on *Miami Latino Broadcasting Corp.*, 5 FCC Rcd 7321 (1990), where the Commission found that a two-year radio talk show host contract did not interfere with the applicant's integration commitment. Arlington 68 asserts that, if elected, Reyes' term would have expired before Arlington 68's station could become operational, thus posing no conflict. In *Miami Latino*, the principal's employment was considered during the hearing, it was for a limited term and it was due to expire before her station would be operational. Moreover, the talk show position was compatible with her management role at the proposed station. Here, because Reyes' integration proposal, as noted above, was not compatible with her proposed responsibilities as a prospective member of Congress, it was appropriate to require Arlington 68 to reconcile Reyes' campaign for political office with her integration commitment at the time it was reported to the Commission. However, Arlington 68 did not attempt to show that Reyes could carry out her conflicting responsibilities or otherwise reconcile her race for Congress with her integration commitment in a timely manner, and her integration proposal was thus properly rejected by the Board. 6 FCC Rcd at 3413 ¶ ¶ 9-11. The Commission cannot predict whether or not a congressional candidate will be elected or, if elected, whether or not the candidate will run for reelection.

16. *Native American:* Native American is a limited partnership comprised of one general partner, Sandra Blevins (20% equity interest), and one limited partner, Crystal Hilliard (80% equity interest). It seeks 100% credit for Sandra Blevins' proposed integration. There is no evidence of undue influence or improper involvement by the limited partner that would affect Native American's integration credit. However, we agree with the Board that Native American is entitled to no credit for Sandra Blevins' integration proposal because of the significant involvement of non-owner, Isaac Blevins, in forming and in prosecuting Native American's application. As set forth below, we find that this involvement is a basis for concluding that Sandra Blevins failed reliably to demonstrate that she will exercise *exclusive* control over the proposal. In this regard, Native American has the burden of establishing the credibility of its ownership structure (i.e., that Sandra Blevins, as the sole general partner, will exercise exclusive control over the applicant). *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497, 2498 ¶ 5 (1991). When the post-formation record, standing alone, does not reliably demonstrate that the general partner or voting shareholders will have exclusive control over the applicant, it is appropriate to evaluate the integration proposal in light of both its pre-formation and post-formation activities. *Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5601 ¶ 16 (1991).

17. Notwithstanding Native American's claim that Sandra Blevins was the prime mover behind the application and that she is legally responsible for the applicant, the post-formation record does not corroborate her claimed control over the applicant. Indeed, there is no evidence of any independent decision making by Sandra Blevins after the B cut-off date. The ALJ found that the limited partnership agreement was executed within 30 days of the B cut-off date. 4 FCC Rcd 4018, 4034-35 ¶ ¶ 158-60 (ALJ 1989). The post-formation record reflects that at best, her involvement has been, and will likely continue to be, only ministerial. 4 FCC Rcd at 4034-35 ¶ ¶ 158-60. It is therefore appropriate to consider the pre-formation record to determine if Sandra Blevins, as the only general partner, will have exclusive control over the applicant, notwithstanding the apparent lack of any substantial post-formation involvement.

18. The pre-formation record likewise reflects little independent decision-making activity by Sandra Blevins that would corroborate her claimed exclusive control over the applicant. It appears that Isaac Blevins, an experienced broadcaster with no ownership interest in the applicant, was also active in forming the applicant and in prosecuting its application. Although Native American credits Sandra

[6] Reyes' explanatory statement was an untimely effort to reopen the record. Although Arlington 68 claims it submitted the statement at the first opportunity, it failed to file the statement until after this proceeding had been remanded on issues not related to Arlington 68. Indeed, if this matter had not been remanded on other grounds, under Arlington 68's logic, her statement would never have been presented to the Commission. Arlington 68 should have submitted a petition to reopen the record to accept Reyes' statement when it submitted the Section 1.65 statement advising the Commission of her congressional campaign.

Blevins with the idea of filing the instant application (citing Tr. 4428), she admitted that Isaac Blevins located the frequency, advised her that it was available and asked her if she "might be interested in applying." Tr. 4427-28. Native American argues that Sandra Blevins "completed, filed, and prosecuted the application; arranged financing; and independently made all associated decisions with the advice of her hired engineering consultant and legal counsel (Tr. 4446, 4447)." The record, however, simply indicates that she was involved in preparing and reviewing the application without providing any indication of the extent of her involvement. Tr. 4446. Further, while Native American claims that Sandra Blevins approved the transmitter site, she admitted that she never met with the site owner. Tr. 4461. Moreover, although Native American claims that Sandra Blevins acted independently in assembling the local public inspection file and the publication of notice in the local newspaper, these tasks are largely ministerial. Therefore, standing alone, these activities are not enough to corroborate Sandra Blevins' claim to have exclusive authority over the applicant.[7]

19. It was Isaac Blevins rather than Sandra Blevins who made the initial effort to locate a place for the public inspection file. He was also involved in arranging for the newspaper publication of local notice, albeit by delivering the notice to the newspaper, Tr. 4346-47, in arranging financing for North American (he independently visited several banks on its behalf), Tr. 4435, and in discussions concerning the station's staffing and proposed hours of operation, Tr. 4441-43, 4446. The record indicates that if Native American's application is granted, Isaac Blevins will leave his employment as chief engineer and acting manager of a station in Plano, Texas. Tr. 4447, 4457. The Blevins testified that they have not discussed whether Isaac will work at the proposed station. However, Isaac Blevins is an experienced broadcaster, whereas Sandra Blevins' experience is limited to being a part-time (10 hrs. a week) Special Assistant to the General Manager of the Plano station from May 1985 to July 1986. Native American Ex. 2, p. 3. The disparity in their broadcast experience, Isaac Blevins' involvement in Native American's decision making, and his stated intention to resign his current broadcast position increase the likelihood of his continuing involvement in Native Americans' affairs, and accordingly render the applicant's integration proposal uncertain. *Evergreen*, 6 FCC Rcd at 5601-02 ¶ 18.

20. The likelihood that non-owner Isaac Blevins will exercise control over the applicant is further enhanced by the fact that Sandra Blevins paid little attention to the applicant's affairs,[8] deferring instead to her legal and engineering advisors, who in turn had long term social and business associations with Isaac Blevins.[9] While reliance on such experts does not undermine the reliability of an otherwise credible proposal, it may be consistent with a finding that the owner will not exercise exclusive control over the applicant, particularly if, as in this case, the expert is associated with an interested party.[10] Here, the engineer and attorney hired by Sandra Blevins were friends and business associates of Isaac Blevins. Indeed, it was the engineer who first alerted Isaac Blevins that Channel 68 was available. 4 FCC Rcd at ¶ 165. Given the long-term association of the engineer and Isaac Blevins, as well as Isaac Blevins' involvement in prosecuting Native American's application, Sandra Blevins' deference to these two individuals (neither of whom has an ownership interest in Native American) further undermines the credibility of Native American's ownership structure. Thus, Native American has not met its burden of reliably establishing that if its application were granted, Sandra Blevins would exercise exclusive control over the proposed station. Therefore, we affirm the Board's finding that Native American's ownership structure is unreliable and that it consequently warrants no comparative credit for Sandra Blevins' integration proposal.[11] 6 FCC Rcd at 3414-15 ¶ ¶ 18-19.

21. *Southwest:* The Board, 6 FCC Rcd at 3414 ¶ ¶ 15-17, properly refused to credit Southwest's integration proposal because of the role of its limited partner, David Wagner. Wagner has a 90 percent interest in Southwest and the partnership agreement gave him unilateral authority to terminate the partnership.[12] The authority to terminate the partnership is significant because the general partner is thereby not insulated from the possibility of influence or control by Wagner. *Doylan Forney*, 3 FCC Rcd 6330, 6332 (Rev. Bd. 1988), rev. den. 5 FCC Rcd 5423 (1990), *aff'd Maricopa Media, Inc v. FCC*, Case No. 90-1459 *et al* (D.C.

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[7] This case is distinguishable from *National Communications Industries*, 7 FCC Rcd 1703, 1705 n.5 (1992), where the Commission credited the proposal of an individual who, in addition to arranging for the publication of the local notice, had handled the corporation's financial matters from the start, had exclusive discretion to decide when to make capital calls, had received and paid all corporate bills, and had supplied the EEO information included on the application. In contrast, this record reflects no involvement in fundamental activities and only minimal involvement in purely ministerial activities by the purported general partner, Sandra Blevins.

[8] For example, she accepted without question and without consulting her own attorney the partnership agreement prepared by the limited partner's attorney and although she was responsible for keeping the partnership books, she did not know whether subsequent contributions from the limited partner were loans or advance capital contributions. Tr. 4434, 4464-65.

[9] In refusing to credit Sandra Blevins' integration proposal, we do not rely on her marriage to Isaac Blevins, per se. See, e.g., *Marlin Broadcasting Corp.*, 5 FCC Rcd 5751, 5752-53 ¶ 15 (1990), *aff'd sub nom. Marlin Broadcasting Corp. v. FCC*, No 90-1505 (D.C. Cir. decided Jan.7 , 1992); *Evergreen Broadcasting Company*, 6 FCC Rcd at 5601-02 ¶ ¶ 187-18 & nn.16, 17; and *Clarification of Commission Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920, 1922 (1992). Rather, our determination here is based on record evidence showing that Sandra Blevins will not exercise the independent managerial authority necessary to warrant any integration credit.

[10] See *Fresno FM Limited Partnership*, 6 FCC Rcd 6998, 6999-7000 ¶ 6 & n.6 (1991), in which the nominal general partner's deference to his attorney was one of several reasons for not crediting his integration proposal.

[11] Native American's other arguments concerning Mrs. Blevins' enhancement credit for civic participation, Charisma's intergration proposal, and Thornton's integration are thus not decisionally significant.

[12] We agree with the Board that Wagner's belated relinquishment of his right to terminate the agreement, which was filed only after an adverse ruling by the ALJ, came too late in the comparative process to be of decisional significance. See 6 FCC Rcd at 3414 ¶ 17.

Cir. Oct. 7, 1991).[13] Thus, Wagner was not properly insulated from involvement in Southwest and, at most, Southwest is entitled to credit for the integration of its general partner's 10 percent equity interest. *Doylan Forney, supra.*

22. *Charisma:* Finally, we note that the Board erred in failing to find that Charisma was entitled to very slight integration enhancement credit for past broadcast experience. 4 FCC Rcd at 4021 ¶ 30. That error is not decisionally significant, however, because of the enhancements of Metroplex's integration proposal.[14] Metroplex is ultimately preferred over Charisma and the other applicants because its advantages for minority ownership and broadcast experience are considerably greater than Charisma's overall advantage for local residence and civic activities. In this regard, Charisma's superiority on the local residence and civic activities factor based on its quantitative advantage is considerably diminished by the more substantial showing of civic involvement by Metroplex's 49 percent owner[15] and by the proposal of Metroplex's 51 percent owner to relocate to Arlington.[16] See 6 FCC Rcd at 3415 ¶ ¶ 20-21.

23. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed July 1, 1991 by Charisma Broadcasting Corporation, Arlington 68 TV, Inc., United Broadcast Group, Ltd., Sammy A. Thornton and Native American Broadcasting Limited Partnership ARE DENIED.

24. IT IS FURTHER ORDERED, that the Contingent Application for Review filed July 1, 1991 by Metroplex Communications, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[13] In *CIMA Broadcasting Ltd.*, 60 RR 2d 464 (Rev. Bd. 1985), cited by Southwest, a limited partnership agreement provided for the termination of the partnership after three years. The Board rejected arguments that the partnership was not a viable entity because it lacked permanence, noting that the partners testified that it was always their intention to renew the partnership, that the termination provision was inserted by local counsel to conform to state law, and that the term for the limited partnership had been extended to twenty-five years. *CIMA* was vitiated by *Forney* and is hereby explicitly overruled to the extent that it suggested that the authority to terminate a limited partnership agreement is irrelevant to the insulation requirements of *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981).

[14] In accordance with *Lamprecht* v. *FCC*, 958 F.2d 382 (D.C. Cir. 1992), no consideration has been given to the claims of credit for female ownership.

[15] *Ronald Sorenson*, 6 FCC Rcd 1952 (1991).

[16] Metroplex is awarded minor enhancement credit for its proposed future residence. *Newton Television Limited*, 3 FCC Rcd 533, 555 ¶ 8 (Rev. Bd. 1988), rev. den. 4 FCC Rcd 2561 (1989).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

METROMEDIA COMPANY File No. 00420-CL-TC-1-91

For Transfer of Control of
AWACS, Inc., licensee of
Station KNKA382, in the
Domestic Public Cellular
Telecommunications Radio
Service on Frequency Block A,
in Market 4, Philadelphia,
Pennsylvania MSA

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 14, 1993; Released: February 9, 1993**

By the Commission:

## I. INTRODUCTION

1. In this Order, we address an application for review filed by United States Cellular Corporation and its subsidiary, Vineland Cellular Telephone Company (Vineland) (jointly, USCC), seeking reversal of *Metromedia Company*, 7 FCC Rcd 714 (Mobile Serv. Div. 1992) (*Order*). For the reasons discussed below, we deny USCC's application for review.

## II. BACKGROUND

2. On June 24, 1991 Metromedia Company (Metromedia) filed the referenced application to transfer control of AWACS, Inc. (AWACS), licensee of the non-wireline cellular system in Philadelphia, Pennsylvania, to Comcast Cellular Communications, Inc. (Comcast). The application was opposed by USCC, alleging that Comcast, through its subsidiary American Cellular Network Corp. (Amcell), has illegally assumed control of the non-wireline cellular system in Atlantic City, New Jersey, and that Amcell has attempted to conceal this fact from the Commission. USCC therefore contended that Amcell's actions demonstrated that Comcast does not have the requisite character qualifications to acquire control of AWACS.

3. In the proceeding before the Mobile Services Division (MSD), USCC claimed it had standing to oppose the proposed transfer because Vineland would be harmed economically if Comcast where allowed to acquire control of AWACS and thus the Philadelphia system. In support of this claim USCC explained that Vineland's service area is surrounded by the Philadelphia, Atlantic City, and Wilmington, Delaware, markets upon which it depends heavily for revenues generated from roamer fees it charges subscribers from these markets. USCC said that the fees it earns from the latter two markets are considerably less than those it receives from customers in the Philadelphia area. This, USCC claimed, is because the non-wireline licensees in Atlantic City and Wilmington are controlled by Comcast, which has used its dominant market power to force Vineland to accept lower roaming rates from these two markets than it currently receives from the Philadelphia system. USCC therefore concluded that if Comcast were to acquire control of the Philadelphia license also, it would force Vineland to reduce the charges it now receives from Philadelphia roamers.

4. The MSD, in the *Order*, found, *inter alia:* (1) USCC had failed to establish that it had standing to contest the transfer of control application; (2) USCC's allegations of misconduct and unauthorized transfer of control to the licensee in the Atlantic City market were collateral issues that were under consideration in another proceeding and thus did not affect Comcast's qualifications to be the licensee of the Philadelphia system; and (3) USCC's allegations did not demonstrate that Comcast's subsidiary, American Cellular Network Corp. (Amcell), controlled the Atlantic City system.

## III. DISCUSSION

5. USCC contends that the MSD erred in each of its findings, which requires that the Commission overturn the MSD's decision and order a hearing to determine: (1) whether Comcast or any of its subsidiaries has assumed unauthorized *de facto* control of the Atlantic City cellular system; (2) whether Comcast or any of its subsidiaries concealed material information from the Commission relating to Amcell's unauthorized assumption of control of the Atlantic City system; and (3) in light of the evidence adduced under these two issues, whether Comcast is qualified to acquire control of the Philadelphia system.

6. Subsequent to USCC's filing the instant petition, we adopted *Ellis Thompson Corporation*, 7 FCC Rcd 3932 (1992) (*Ellis Thompson*), which rejected the same substantive arguments at issue here.[1] In *Ellis Thompson* all of USCC's allegations concerning Comcast's subsidiary Amcell were found unavailing. We determined that Amcell had neither acquired *de facto* control of the Atlantic City system nor concealed material information from the Commission. Given our holding in *Ellis Thompson*, there is no reason to address the same allegations again.

## IV. CONCLUSION

7. In sum, given the decision in *Ellis Thompson*, we deny the application for review.

[1] The Ellis Thompson case was before us pursuant to an application for review and a supplement to the application filed jointly by USCC and its parent, Telephone and Data Systems, Inc., which sought reversal of Ellis Thompson, 4 FCC Rcd 2599 (Com. Car. Bur. 1989), upholding Ellis Thompson, 3 FCC Rcd 3962 (Mobile Serv. Div. 1988), wherein the MSD conditionally granted the subject application. Our decision has been appealed. Ellis Thompson *sub nom.* Telephone and Data Systems, Inc., United States Cellular Corp. v. FCC, No. 92-1273 (D.C. Cir.), filed June 25, 1992.

**V. ORDERING PARAGRAPH**

8. Accordingly, IT IS ORDERED THAT the Application for Review filed jointly by United States Cellular Corporation and Vineland Cellular Telephone Company in the above-captioned proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION
d/b/a LCI INTERNATIONAL,
Complainant,

v.

THE UNITED TELEPHONE COMPANY OF PENNSYLVANIA,
Defendant.

File No. E-92-117

**ORDER**

**Adopted: February 1, 1993; Released: February 9, 1993**

By the Chief, Formal Complainants and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1992, Litel Telecommunications Corp. d/b/a/ LCI International (Litel) filed the above-captioned complaint against The United Telephone Company of Pennsylvania (United) seeking damages resulting from United's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On January 21, 1993, Litel and United filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Litel's and United's Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
GAREY M WALLACE COMPANY,
METROMEDIA LONG DISTANCE, INC.,
NTS COMMUNICATIONS, INC.,
RCI NETWORK SERVICES, INC.,
SCHNEIDER COMMUNICATIONS, INC.,
TELECOMMUNICATIONS SERVICES CORP.,
TELEPHONE ASSOCIATES LONG DISTANCE SERVICES,
U.S. LINK,
VALU-LINE OF ST. JOSEPH, INC., and
WESTEL, INC.,
Complainants,

v.

| | |
|---|---|
| GTE NORTH INCORPORATED, | File No. E-91-165 |
| GTE NORTHWEST INCORPORATED, and | File No. E-91-166 |
| GTE SOUTHWEST INCORPORATED, | File No. E-91-167 |

Defendants.

**ORDER**

**Adopted: February 1, 1993; Released: February 9, 1993**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Communications Services, Inc. (CSI) and Metromedia Long Distance, Inc. (MLD), along with other complainants, filed the above-captioned formal complaints against defendants seeking damages resulting from defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On January 22, 1993, the CSI and MLD filed a motion for partial dismissal requesting that they be dismissed from the complaints. In support of their motion, CSI and MLD state that CSI and MLD and defendants have reached a settlement.[1]

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the CSI's and MLD's Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings are TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] CSI and MLD are the only complainants remaining in these proceedings. The other complainants previously were dismissed from these proceedings as a result of their settlements with the defendants. *See* Communications Services, Inc., *et al.* v. GTE North Incorporated, *et al.*, 7 FCC Rcd 7521 (Com.Car.Bur. 1992). Accordingly, the above-captioned complaints will be dismissed in their entirety.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
GAREY M WALLACE COMPANY,
LONG DISTANCE SERVICE, INC.,
NATIONAL TELESERVICES, INC.,
NTS COMMUNICATIONS, INC., and
VALU-LINE OF ST. JOSEPH, INC.,
Complainants

v.

| | |
|---|---|
| CONTEL OF ARKANSAS, INC., | File No. E-91-160 |
| CONTEL OF KANSAS, INC., | File No. E-91-161 |
| CONTEL OF MISSOURI, INC., | File No. E-91-162 |
| CONTEL OF PENNSYLVANIA, INC., and | File No. E-91-163 |
| CONTEL OF VIRGINIA, INC., | File No. E-91-164 |

Defendants.

**ORDER**

**Adopted: February 1, 1993; Released: February 9, 1993**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Communications Services, Inc., (CSI), along with other complainants, filed the above-captioned formal complaints against defendants seeking damages resulting from defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On January 22, 1993, CSI filed a motion for partial dismissal requesting that it be dismissed from the complaints. In support of its motion, CSI states that CSI and defendants have reached a settlement.[1]

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the CSI's Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings in File Nos. E-91-163 and E-91-164 are TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] While CSI requests a partial dismissal of the above-captioned proceedings, we note that it alone has claims remaining in File Nos. E-91-163 and E-91-164. All claims against Contel of Arkansas, Inc. (File No. E-91-160), Contel of Kansas, Inc. (File No. E-91-161), and Contel of Missouri, Inc. (File No. E-91-162) have previously been dismissed in their entirety based on settlements between the complainants and defendants. *See* Communications Services, Inc., *et al.* v. Contel of Arkansas, Inc., *et al.*, 7 FCC Rcd 7519 (Com.Car.Bur. 1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-98**

In re Applications of

| | |
|---|---|
| MARY ANNE EMBREY d/b/a CLARKSVILLE RADIO | File No. BPH-890830MF |
| LISA M. JENKINS | File No. BPH-890905MA |
| Q PRIME, INC. | File No. BPH-890905ME |
| KENTUCKIANA RADIO PARTNERS | File No. BPH-890905MO |
| CLARKSVILLE BROADCASTING LTD. PARTNERSHIP | File No. BPH-890905MU |

For Construction Permit for a
New FM Station on Channel 226A
in Clarksville, Indiana

**Appearances**

*Roy F. Perkins, Jr.* on behalf of Mary Anne Embrey, d/b/a Clarksville Radio; *Barry D. Wood* and *Richard Waysdorf* on behalf of Lisa M. Jenkins; *Gerald Stevens-Kittner* on behalf of Q Prime, Inc.; *Thomas P. Van Wazer* on behalf of Kentuckiana Radio Partners; *Lewis I. Cohen* and *John J. Schauble* on behalf of Clarksville Broadcasting Limited Partnership; and *James W. Shook* on behalf of the Mass Media Bureau.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ**

**Issued: February 2, 1993; Released: February 10, 1993**

## PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Mary Anne Embrey, d/b/a Clarksville Radio, Lisa M. Jenkins (now Lisa Jenkins Harris) Q Prime, Inc., Kentuckiana Radio Partners and Clarksville Broadcasting Ltd. Partnership for a construction permit for a new FM broadcast station to operate on FM Channel 226A at Clarksville, Indiana.[1] The applications were designated for evidentiary hearing pursuant to a *Hearing Designation Order* (HDO) released by the Commission on May 9, 1991 (DA 91-388), which specified the following issues:

> (1) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (2) To determine, in light of the evidence adduced pursuant to specified issue, which of the applications should be granted.

The HDO further provided that the areas and populations to be served by the applicants, and the availability of other aural services to those areas, would be considered under the standard comparative issue.

2. A prehearing conference was held on July 12, 1991, and an admissions session for the receipt of the direct written cases of the applicants and rulings on requests for presentation of witnesses for cross-examination on December 16, 1991. The evidentiary hearing began on January 27 and ended on January 31, 1992. The record in this proceeding was closed on January 31, 1992.

## MARY ANNE EMBREY D/B/A CLARKSVILLE RADIO

### Findings of Fact

3. Mary Anne Embrey (Embrey) is an individual applicant.

### Diversification

4. Ms. Embrey has no interest in, or connection with any medium of mass communications (Embrey, Ex. 1, p. 2).

### Best Practicable Service

5. Ms. Embrey will serve as a full-time General Manager of her proposed station, working a minimum of 40 hours a week. As General Manager, she will be in charge of and direct all aspects of the station's management and operations, including programming, sales, and general administration. Ms. Embrey will terminate her present and any future employment in order to meet her commitment to the proposed station (Embrey, Ex. 1, p. 2).

6. Ms. Embrey has lived within the proposed service area of her station since 1958. In February 1989, the area of her home was annexed by the City of Clarksville, Indiana (Embrey, Ex. 1, p. 3; Tr. 23-4). Prior to 1962, Ms. Embrey assisted in the formation of the McCulloch Volunteer Fire Department and its Women's Auxiliary. In addition, for three years ending in 1962, she was a member and participated in the activities of Jaycees Wives. Ms. Embrey was also a Secretary for the Clarksville Little Generals Football League in 1967, and she participated in the activities of that organization for three or four years. She also worked with the clothing program for needy students at the McCulloch School, from 1970 until June 1988. Ms. Embrey was also a member and active on various committees of the Greater Clark County Schools Association of Educa-

[1] Twelve applications for the Clarksville FM channel were designated for hearing. All but the five applications listed in the caption hereto were dismissed by *Order*, released July 10, 1991 (FCC 91M-2126); *Order*, released October 18,1991 (FCC 91M-3096), and *Memorandum Opinion and Order*, released October 18, 1991 (FCC 91M-3097).

tional Secretaries from 1969 through 1985, and she attended meetings of the Association until June 1988. She was also an active participant in all of its fundraising activities. Ms. Embrey has also been a fundraiser for various charities since 1956, and served as Secretary for the Clarksville Little Generals Basketball League in 1990-1991 (Embrey, Ex. 1, Attachment A).

**Auxiliary Power**

7. Mrs. Embrey will install auxiliary power generators at her studio and transmitter locations (Embrey, Ex. 1, p. 3).

## CONCLUSIONS OF LAW

**Diversification**

8. Ms. Embrey's application is not subject to a diversification demerit.

**Best Practicable Service**

9. At the Admissions Session held in this proceeding on December 16, 1991, an effort was made to establish good cause for presenting the testimony of Keith Reising, a broadcast consultant upon whom Ms. Embrey relied in preparing her application. The argument was advanced that Mr. Reising, the controlling shareholder of WTRE, Inc., the licensee of station WTRE(AM) and WRZQ (FM), Greensburg, Indiana, has been involved in virtually every aspect of Ms. Embrey's application, and that he has played a dominant role in both its preparation and prosecution, whereas, Ms. Embrey's contribution has been minimal. Several references were made to Ms. Embrey's deposition testimony in which she indicated that Mr. Reising advised her of the Clarksville, Indiana allotment; that he obtained the original transmitter site; and that she relied entirely on him to prepare the construction and operating budgets for her proposed station. He also, it is asserted, played a major role in the preparation of the non-engineering portion of the application, and was solely responsible for preparing the engineering portion of the application. In addition, at his suggestion, Ms. Embrey filed several amendments to the application, and Mr. Reising made arrangements for another consulting engineer to prepare the technical portions of an amendment to her application. Ms. Embrey also accepted Mr. Reising's suggestion as to suitable communications counsel. On the basis of these activities by Mr. Reising on behalf of the applicant, for which he has not been paid, it is argued that Ms. Embrey is not a *bona fide* applicant, and, therefore, cannot receive credit for her proposal to be integrated into the management of her station.

10. The matters discussed above were set forth in a Petition to Enlarge Issues filed by Clarksville Broadcasting Ltd. Partnership on October 21, 1991. The Petition was denied by *Memorandum Opinion and Order* (FCC 92 M-728), released on July 1, 1992. The Presiding Judge found therein and he continues to hold the view that there has been no showing that Mr. Reising holds any present, unreported, or future ownership interest in the applicant; that the services performed by him for Ms. Embrey were and are those customarily performed by a broadcast consultant; and that Mr. Reising, a long-time friend of Ms. Embrey's, who is semi-retired, performed these services without charge because of their long term friendship. The Presiding Judge concludes, therefore, that Ms. Embrey's integration proposal is credible, and her application will be awarded a 100 percent quantitative integration credit for her proposal to serve as the proposed station's General Manager. This quantitative integration credit is qualitatively enhanced by her long-term residence within the proposed service area and her residence, since February 1989, in Clarksville, Indiana, with very minor civic involvement, some of which occurred more than 20 years ago, and, therefore, is entitled to little or no weight. The application itself is entitled to an additional comparative credit for its proposal to install an auxiliary power source in order to ensure continued operations in the event of a power failure.

## LISA M. JENKINS

**Findings of Fact**

11. Ms. Jenkins is an individual applicant for the Clarksville FM station (Jenkins, Ex. 1, p. 1).

**Diversification**

12. Ms. Jenkins does not have an ownership interest in any medium of mass communications. Since November 1984, she has been working as a radio advertising sales representative at station WXVW(AM), Jeffersonville, Indiana and since November 1991 for station WAVG(AM), Louisville, Kentucky as well (Jenkins, Ex. 1, p. 3). Ms. Jenkins will resign from her position and sever all connections with stations WXVW(AM) and WAVG(AM), if she is awarded the construction permit for the Clarksville station (Jenkins, Ex. 1, p. 4).

**Best Practicable Service**

13. Ms. Jenkins will serve as her proposed station's General Manager, on a full-time basis, working a minimum of 40 hours a week. As General Manager, she will supervise all aspects of the station's construction and operations, including the administrative, programming, business and technical areas, and she will have ultimate authority for the formulation and implementation of the station's operating policies and budget controls (Jenkins, Ex. 1, p. 1).

14. Ms. Jenkins is a lifelong resident of her proposed service area. Until 1976, she resided in a community immediately north of Clarksville, Indiana, and from 1976 until 1985 she lived in Clarksville, Indiana. Since 1985, she has resided in communities adjacent to Clarksville, Indiana. Ms. Jenkins has indicated that she will continue to reside within the 70 dBu contour of her proposed station in the event that she is the successful applicant (Jenkins, Ex. 1, p. 2). In 1985, Ms. Jenkins worked with the Southern Indiana Chamber of Commerce in its drive to recruit members (Jenkins Ex. 1, p. 2), and since 1988, she has been engaged in fundraising activities for the Southern Indiana Humane Society. In 1990, Ms. Jenkins was named Neighborhood Chairperson for the American Heart Association in New Albany, which is also adjacent to Clarksville, Indiana (Jenkins, Ex. 1, p. 3).

15. From 1984 until November 1991, Ms. Jenkins was employed full-time as a radio advertising sales representative at station WXVW (AM), Jeffersonville, Indiana, and in November 1991, she began providing the same services for station WAVG (AM), Louisville, Kentucky (Jenkins, Ex. 1, p. 3). Ms. Jenkins also serves as temporary sales manager

when the full-time sales manager is out of town, and she has performed other managerial duties at the stations (Tr. 164).

**Auxiliary Power**

16. Ms. Jenkins will install an auxiliary power source at her studio and transmitter locations in order to assure continued operations in the event of a power failure (Jenkins, Ex. 1, p.4).

## CONCLUSIONS OF LAW

**Diversification**

17. The Jenkins application is not subject to a diversification demerit.

**Best Practicable Service**

18. Charles Jenkins, Ms. Jenkins' father, brought to his daughter's attention the availability of the Clarksville frequency, and he urged her to apply for the facility (Tr. 137). In addition, he supplied her with the name and phone number of his communications attorney (Tr. 141), and, Ms. Jenkins concedes, was directly involved in the site selection process for her proposed transmitter. Her father, Mr. Jenkins, is the President, Treasurer, Director, and Shareholder of Sunnyside Communications, Inc., the licensee of station WXVW-AM, Jeffersonville, Indiana and of station WAVG-AM, Louisville, Kentucky (Tr. 138). He also serves as General Manager for both of these stations (Tr.138). Ms. Jenkins currently works as a sales person at her father's radio stations (Tr. 164), and she reports directly to him (Tr. 139). The source of Ms. Jenkins' proposed financing for her station is the INB Banking Company (CBLP, Ex. 6; Tr. 155). Two of its parent company's directors are also directors of Sunnyside Communications, Inc., the above-referred to licensee (Tr. 159, 196). Ms. Jenkins met with Ronald Carroll, the President of INB Banking Company, and she obtained her so-called "financing letter" the day of her meeting with Mr. Carroll (Tr. 174). The evidence of record further indicates that Ms. Jenkins did not provide Mr. Carroll with any information concerning her financial qualifications, either orally or in writing (Tr. 158, 160, 174-75). It is argued that the above set forth facts demonstrate that Mr. Jenkins is and has been the moving force behind his daughter's application, and, in the event that she becomes the licensee of the Clarksville, Indiana facility, will play a dominant role in the management of the station.

19. Although all of the above set forth information was or could have been made known during the discovery process, none of the opposing applicants sought the designation of a real party-in-interest issue against Ms. Jenkins' application. Nevertheless, the argument is made that Mr. Jenkins is the real party-in-interest in Ms. Jenkins' application. Although it is certainly clear from the record that Mr. Jenkins encouraged his daughter to pursue the license and assisted her in prosecuting the application, his interest and aid to his daughter in her efforts to secure a broadcast facility for herself are, the Presiding Judge believes, perfectly understandable in light of the familial relationship that exists between the two. Ms. Jenkins, herself, is an adult with several years of experience in selling advertising time at a radio station. There is nothing in the record which casts doubt on her ability to operate and manage a broadcast station independently of her father. In fact the evidence of record is to the contrary. Ms. Jenkins personally received site location maps from her engineer, and she discussed the process of selecting and securing site availability assurance from the owner of the site directly with communications counsel (Tr. 147, 151, 186). In addition, she alone went out to examine the possible site, and, on her own, negotiated the terms of the agreement with the owner of her proposed tower site; her father did not accompany her to check out the various sites, and he did not communicate with any landowner on her behalf (Tr. 151,184-87). Nor is there any evidence of record that anyone other than Ms. Jenkins was involved in obtaining the loan assurance letter from INB Banking Company. Ms. Jenkins has maintained a personal account at the bank (Tr. 156-58), and she has been for many years an acquaintance of the Chairman of the Bank (Tr. 156-58). Ms. Jenkins, personally, called INB's Chairman, and set up an appointment with him to discuss the proposed loan (Tr. 173). She also testified that she discussed with the Bank Chairman every aspect of the application, including the operating budget and construction costs (Tr. 175-76). The mere fact that two of Sunnyside's Directors sit on the Board of Directors of INB Bank, standing alone, does not warrant a finding that anyone other than Ms. Jenkins was involved in securing the loan. Mr. Jenkins limited participation in the application process and the lack of any evidence that he has contributed financially to the prosecution of Ms. Jenkins' application further supports her claim that her father has no ownership interest in her application, and that she will operate her station independently of her father (Tr. 192-95, 197-98). The Presiding Judge, therefore, finds no basis for either discounting Ms. Jenkins' claimed 100 percent integration credit, or for subjecting Ms. Jenkins' application to a diversification demerit on the basis of the media interests owned by her father. He further finds that Ms. Jenkins 100 percent quantitative integration credit is qualitatively enhanced by her life-long residence within the proposed service area of her station with some, very minor civic involvement and, to a very limited extent, by her past broadcast experience. The application, itself, is comparatively enhanced by her proposal to install an auxiliary power source in order to ensure continued operation in the event of a power failure.

## Q PRIME, INC.

**Findings of Fact**

20. Q Prime, Inc. (Q Prime) is a corporation organized under the laws of the State of New Jersey. Clifford N. Burnstein and Peter D. Mensch each own 50 percent of the issued and outstanding common stock of Q Prime. Mr. Bernstein is Co-President and Treasurer of Q Prime, and Mr. Mensch is the Co-President and Secretary of Q Prime. The Messrs. Bernstein and Mensch are the sole directors of Q Prime (Q Prime, Ex. 1).

**Diversification**

21. Mr. Bernstein and Mr. Mensch each own 50 percent of the voting stock in and are officers and directors of Ionosphere Broadcasting Corporation, Stratosphere Broadcasting Corporation, Troposphere Broadcasting Corporation and Atmosphere Broadcasting Corporation, which are the sole general partners in Ionosphere Broadcasting Limit-

ed Partnership (Ionosphere), Stratosphere Broadcasting Limited Partnership (Stratosphere), Troposphere Broadcasting Limited Partnership (Troposphere), and Atmosphere Broadcasting Limited Partnership (Atmosphere) (Q Prime, Ex. 3). Ionosphere holds a permit to construct a new FM broadcast station at Woodlake, California; Stratosphere is the licensee of FM broadcast station KSTT-FM, Los Osos-Baywood Park, California; and Troposphere holds a permit to construct a new FM broadcast station at Greenfield, California. In addition, Atmosphere owns 100 percent of the issued and outstanding stock of Double D Broadcasting Company, the licensee of FM broadcast station KRAB, Green Acres, California (Q Prime, Ex. 3). Mr. Burnstein and Mr. Mensch are also the only limited partners in Ionosphere, Stratosphere, Troposphere and Atmosphere, and are the only officers and directors of Double D Broadcasting Company (Q Prime, Ex. 3). Q Prime has not committed itself to divest any of the media interests held by it or anyone of its principals in the event that its application is granted (Q Prime, Ex. 3).

**Best Practicable Service**

22. Q Prime does not propose any full-time or part-time integration of ownership into management (Q Prime, Ex. 2).

**Auxiliary Power**

23. Q Prime proposes to install an auxiliary power source at its studio and transmitter locations in order to ensure continued operations in the event of a power failure (Q Prime, Ex. 4).

## CONCLUSIONS OF LAW

**Diversification**

24. Q Prime is subject to a diversification demerit on the basis of the media interests owned by the Messrs. Bernstein and Mensch.

**Best Practicable Service**

25. Q Prime will not integrate any portion of its ownership into management at its proposed station. Accordingly, it is not entitled to any integration credit. However, it does propose to install an auxiliary power source at its studio and transmitter locations. Its application is, therefore, entitled to a comparative credit for this aspect of its proposal.

## KENTUCKIANA RADIO PARTNERS

### Findings of Fact

26. Kentuckiana Radio Partners (Kentuckiana) is a general partnership comprised of six general partners: Martha Sue Anderson; Wanda D. Cooper; Frances W. Larsen; Margaret Ann Wells; Donna J. Kiley; and Joyce D. Brenzel (Kentuckiana, Ex. 1, p. 1). Ms. Anderson, Ms. Cooper and Ms. Larsen each hold a 20 percent general partnership interest in Kentuckiana, Ms. Wells and Ms. Kiley, individually, a 13.4 percent general partnership interest in Kentuckiana, and Ms. Brenzel a 13.2 percent general partnership interest (Kentuckiana, Ex. 1, p. 1).

**Diversification**

27. Ms. Cooper and her husband, Charles B. Cooper, own a 7.77 percent general partnership interest in Radio Orlando, the licensee of station WMMO (FM), Orlando, Florida, and they own 49 percent of the equity and non-voting stock in Charisma Radio Corporation, the permittee of a new FM station in Highlands, North Carolina. In addition, several of the Kentuckiana principals have ownership interests in Signal Mountain Radio Partners, a five percent voting shareholder and a nine percent non-voting shareholder of Signal Mountain Radio Consolidation, Inc., the permittee of a new FM station in Signal Mountain, Tennessee (Kentuckiana, Ex. 2, pp. 2-5). In the event that Kentuckiana's application is granted, the principals of Kentuckiana and their spouses will divest themselves of any present and future cognizable interests in any medium of mass communications prior to the commencement of program tests for the proposed station (Kentuckiana, Ex. 2, p. 5).

**Best Practicable Service**

**Margaret Ann Wells**

28. Ms. Wells will work full-time at the station as General Manager, and she will devote a minimum of 40 hours a week to her duties there (Kentuckiana, Ex. 3, p. 1). As General Manager, she will oversee and be responsible for the station's entire operations, including its day-to-day management and budgeting (Kentuckiana, Ex. 3, p. 1). Ms. Wells intends to curtail all other activities in order to meet her commitment to her duties at the station.

29. Ms. Wells has been a resident of Louisville, Kentucky since 1946. Louisville, Kentucky lies within the primary service area of Kentuckiana's proposed station (Kentuckiana, Ex. 3, p. 1). Ms. Wells has been a member of the Board for the past seven years and of the Executive Committee for the past three years of the Kentucky Arts and Crafts Foundation, and she is Chairman of the Foundation's Fundraising Committee. For the past six years she has also been a member of the Board of Actors Theater of Louisville, Kentucky. She is currently vice-president of the Women's Club of Louisville, and an active member of the Holy Trinity Church (Kentuckiana, Ex. 3, pp. 1-2). She is also a Board Member of River Fields, Inc., an environmental group concerned with monitoring pollution, zoning, and other changes on the Ohio River in both Kentucky and Indiana, and she has served as its vice-president for the last eight months. Ms. Wells is currently a member of the River Fields Fundraising committee, and served as founding chairman of its Membership Committee (Kentuckiana, Ex. 3, pp. 1-2).

**Martha Sue Anderson**

30. Ms. Anderson will serve as Operations Manager at the proposed station, devoting a minimum of 40 hours a week to her duties at the station (Kentuckiana, Ex. 4, p. 1). As Operations Manager, she will be responsible for supervising the day-to-day operations of the part-time administrative staff, overseeing a part-time bookkeeper and an outside accountant. Ms. Anderson will curtail all other activities and employment in order to effectuate her commitment to the proposed station.

31. Ms. Anderson has resided in Clark County, Indiana, within the primary service area of Kentuckiana's proposed station, since 1983.

**Joyce D. Brenzel**

32. Ms. Brenzel will work full-time, a minimum of 40 hours a week, as Program Director at the proposed station, and she will curtail all other activities in order to meet this commitment (Kentuckiana, Ex. 5, p. 1). As Program Director, she will oversee the day-to-day programming of the station, the selection of a satellite musical format for the station, as well as the part-time announcers at the station (Kentuckiana, Ex. 5, p. 1).

33. Ms. Brenzel was born in Louisville, Kentucky in 1942, and she has lived within Kentuckiana's proposed primary service area for all but four of the past 50 years. Ms. Brenzel is currently a member of the Kentucky Arts and Crafts Foundation and the Big Springs House Committee. In addition, she has been a member of the Our Lady of Lourdes Church Auxiliary for the past three years. From 1985 to 1987, she was Chairman of the Junior Golf Interclub and the Junior Girls Interclub Tennis Teams (Kentuckiana, Ex. 5, pp. 1-2).

**Donna J. Kiley**

34. Ms. Kiley will serve as full-time News and Public Affairs Director, devoting a minimum of 40 hours a week to her duties at the station. As News and Public Affairs Director, she will oversee the news gathering operations, schedule and host public affairs programming, and schedule and select the public service announcements that are to be aired on the station. Ms. Kiley proposes to curtail all other activities and employment in order to effectuate her commitment to the station (Kentuckiana, Ex. 6, p. 1).

35. Ms. Kiley has lived in Louisville, Kentucky, within the proposed service area, since 1968 (Kentuckiana, Ex. 6, p. 1). Ms. Kiley was a member of the Sacred Heart Model School Parent Board from 1982 until 1984, and a member of the Bellarmine College Showhouse Committee from 1990 until 1991. She is currently, and has been a member of the Holy Trinity Church since 1975 (Kentuckiana, Ex. 6, pp. 1-2).

**Auxiliary Power**

36. Kentuckiana proposes to install an auxiliary power source at its studio and transmitter locations in order to ensure continued service in the event of a power failure (Kentuckiana, Ex. 7, p.1).

## CONCLUSIONS OF LAW

**Diversification**

37. Kentuckiana's principals and their spouses have committed themselves to divest any and all interests in any medium of mass communications prior to the commencement of program tests for the proposed Clarksville station. Accordingly, the Kentuckiana application is not subject to a diversification demerit on the basis of the media interests presently held by its principals or their spouses.

**Best Practicable Service**

38. The various opposing applicants do not contest Kentuckiana's claim that it is entitled to an integration credit for its proposal to integrate Ms. Wells as the station's General Manager, Ms. Kiley as News and Public Affairs Director, and Ms. Benzel as the station's full-time Program Director. However, they do dispute the claim of a management level position for Ms. Anderson. They contend, and the evidence of record supports their contention, that Kentuckiana has not demonstrated that the position at the proposed station envisioned for Ms. Anderson would involve management level or policy making responsibilities. Ms. Anderson proposes to serve as the Operations Manager, which is not one of the commonly referred to management level positions as recognized in the so-called 1965 Policy Statement. The record identifies her duties as overseeing a part-time bookkeeper, an administrative person also scheduled to be part-time, and an outside accountant. The mere supervision of such personnel does not qualify Ms. Anderson for integration credit. Accordingly, in the absence of any response to these allegations on the part of Kentuckiana, and on the basis of the Presiding Judge's review of the record, he concludes that Kentuckiana is not entitled to an integration credit for Ms. Anderson. It will, however, be awarded an integration credit of 13.4 percent for its proposal to integrate Ms. Wells, a 13.2 percent quantitative integration credit for Ms. Brenzel, and a 13.4 percent quantitative integration credit for Ms. Kiley. Ms. Wells' quantitative integration credit is qualitatively enhanced by her residence, since 1946, within the service area of Kentuckiana's proposed station, with a minor degree of enhancement for civic involvement within the community. Similarly, Ms. Brenzel's quantitative integration credit is entitled to qualitative enhancement for her residence within the service area of Kentuckiana's proposed station for all but four of the last 50 years, with a slight degree of civic involvement within the proposed service area. Finally, Ms. Kiley, who has lived in Louisville, Kentucky since 1968, which lies within the service area of Kentuckiana's proposed station, is entitled to a qualitative enhancement of her integration credit for service area residence with an additional, very slight credit for her past involvement in the civic affairs of her community.

39. The Kentuckiana application is entitled to a further comparative credit for its proposal to install an auxiliary power source at its studio and transmitter locations.

## CLARKSVILLE BROADCASTING LTD. PARTNERSHIP

**Findings of Fact**

40. Clarksville Broadcasting Ltd. Partnership (CBLP) is a limited partnership organized under the laws of the State of Kentucky. Joyce Jones is the sole general partner with a 25 percent ownership interest, Charles LeGette is a limited partner with a 25 percent ownership interest, and Young Broadcasting Corporation of Kentucky (YBCK) is also a limited partner with a 50 percent ownership interest (CBLP, Ex. 1). Karen Young owns 20 percent of YBCK's outstanding stock and 100 percent of its voting stock. James A. Patterson and C. Edward Glasscock each own 40 percent of YBCK's outstanding stock as non-voting stock (Jenkins, Ex. 14, p. 4).

41. When CBLP filed its application on September 5, 1989, it was a Delaware Limited Partnership (Tr. 287). Ms. Jones was the sole general partner with a 25 percent ownership interest, and Mr. LeGette, the sole limited partner, held a 75 percent ownership interest (Jenkins, Ex. 5, p. 3). On February 27, 1991, CBLP was formed as a Kentucky limited partnership, and an amendment reflecting this change was filed as a matter of right on February 28, 1991 (Jenkins, Ex. 11).

**Diversification**

42. Neither CBLP, Joyce Jones nor Charles LeGette has any ownership interest in any medium of mass communications (CBLP, Ex. 1). YBCK is a limited partner with a 50 percent ownership interest in J.L. Givens Associates, L.P., which is the permittee of a new FM station in Lexington-Fayette, Kentucky (CBLP, Ex. 1; Tr. 99-100).

**Best Practicable Service**

43. Joyce Jones, an African-American, will serve as CBLP's General Manager, devoting a minimum of 40 hours a week to her duties at the station. As General Manager, she will exercise supervisory control over all aspects of the station's operations, including programming, public service announcements, sales, personnel matters, the station's equal employment opportunity program, as well as its business affairs (CBLP, Ex. 4, p. 2). Ms. Jones will terminate her current employment with station WLKY-TV and any other employment she might have or acquire in order to work full-time at CBLP's proposed station (CBLP, Ex. 4, pp. 1-2).

44. Ms. Jones has been a resident of Louisville, Kentucky since 1973. Louisville, Kentucky is adjacent to Clarksville, Indiana and lies within the service area of CBLP's proposed station (Joint Engineering Exhibit; Tr. 455). Ms. Jones has been a member of the following organizations: National Conference for Negro Women, Louisville, Kentucky branch (1988-1990); American Women in' Radio and Television (1988-1990); Ad Club of Louisville, Kentucky (1985-1990); and Ad II, an organization for young people in the advertising industry (1983). Ms. Jones has attended meetings of these organizations and participated in seminars offered by the National Conference for Negro Women (CBLP, Ex. 4, p. 1).

45. Ms. Jones has been employed as a full-time Sales Assistant at television station WKLY-TV at Louisville, Kentucky since 1982. From 1981 to 1982, Ms. Jones served as a full-time receptionist at station WLKY-TV (CBLP, Ex. 4, p. 1).

**Auxiliary Power**

46. CBLP will install an auxiliary power source at its studio and transmitter locations in order to ensure continued operations in the event of a power failure (CBLP, Ex. 1).

## CONCLUSIONS OF LAW

**Diversification**

47. YBCK's limited partnership interest in the Permittee of a new FM station in Lexington-Fayette, Kentucky is of no decisional significance.

**Best Practicable Service**

48. The evidence of record clearly demonstrates that Mr. LeGette, with the assistance of communications counsel, initiated the application process and sought out Ms. Jones as the Applicant's General Partner and the proposed station's General Manager. Subsequently, after the substitution of the present Kentucky limited partnership for the original Delaware limited partnership, Mr. Glasscock, a limited partner in YBCK, assumed the dominant role in the prosecution of CBLP's application. Mr. LeGette first heard about the Clarksville, Indiana allocation from John Rutledge (Tr. 974). He subsequently got in touch with Lewis Cohen, attorney of record for CBLP, with whom he had worked in the past (Tr. 973-74), who gave him general advice with respect to the prosecution of an application before the Federal Communications Commission. Mr. LeGette then got in touch with Ms. Jones, whom he knew through her job at station WLKY-TV in Louisville, Kentucky, having earlier been advised by Mr. Cohen of the comparative advantages of having a member of a minority group as the sole general partner of a limited partnership (Tr. 979-80), and mentioned to her the availability of the Clarksville allotment (Tr. 981-82). They met at a later date, and Mr. LeGette asked her if she wanted to be part of the application (Tr. 212-13); at the same time, he advised her that she would be General Manager of the station if the application was granted (Tr. 986). Mr. LeGette then contacted Mr. Cohen and informed him of Ms. Jones apparent interest in the endeavor, and Mr. Cohen offered to call her (Tr. 990-91). The three individuals, Mr. Cohen, Mr. LeGette and Ms. Jones, met in Louisville, Kentucky. Although at the hearing, Ms. Jones was unable to say who invited'Mr. Cohen to the meeting in Louisville, Kentucky, at deposition, she mentioned that Mr. LeGette informed her that Mr. Cohen, whom he identified as counsel from Washington, would attend the meeting (Tr. 229-30). According to her deposition, Mr. Cohen's early on expenses were paid by Mr. LeGette ( Tr. 231-32). At the meeting, Mr. Cohen suggested that the applicant take the form of a limited partnership, and that there be an equity split of 25 percent for Ms. Jones and 75 percent for Mr. LeGette (Tr. 996-97). Apparently, no negotiations were conducted as to the proposed equity split (Tr. 244, 1000-01). The initial partnership agreement, hereinafter referred to as the Delaware agreement, was drafted by Counsel. Ms. Jones was not required to make any financial contribution to the enterprise, and Mr. LeGette was charged with securing the necessary funds for the prosecution of the application as well as the loan commitment letter which he secured and then delivered to Ms. Jones (Tr. 1035). According to her testimony, Ms. Jones is under no obligation to pay or repay any of the costs of prosecuting the application, even if the application is denied (Tr. 289). Her services on behalf of the Applicant were and are to consist of finding a transmitter site, communicating with counsel, conducting research to complete the application form, hiring an accountant, speaking with financial sources about the need for a loan, and doing whatever else may be required to prosecute the application (Tr. 339-40). Ms. Jones, however, was never asked to do anything to secure a loan, and never discussed the matter with Mr. LeGette (Tr. 252-53, 256-60). She did speak with a consulting engineer, Mr. Mullaney, who was retained at the suggestion of Counsel, and the engineer in turn suggested that a Mr. Daly, doing business as Telsa, Inc., be retained to find an antenna site (Jenkins, Ex. 15; Tr. 596). Although she testified that she initially hired another individual to locate a suitable antenna site, whose name she could not recall, she gave him just a couple of days to locate a suitable site before she hired Telsa, Inc. (Tr. 629, 633-34). Ms. Jones was not involved in negotiations with respect to the amount of the rent for the tower site (Tr. 569), and Telsa, Inc. was paid directly by Counsel out of funds provided by Mr. LeGette (Tr. 292).

49. Ms. Jones, in conjunction with Counsel, prepared a budget for the proposed station, and Counsel informed Mr. LeGette as to the amount (Tr. 1036-37). She testified that Counsel obtained information as to Mr. LeGette's finances during the preparation of the application (Tr. 270-71), but

she was not shown a personal balance sheet for Mr. LeGette prior to completing the application, and she did not provide the prospective lending institution or anyone else, with a financial statement for herself (Tr. 597). Although Mr. LeGette secured the loan commitment, he did not tell her the amount of the loan, and she did not learn of its amount from anyone else (Tr. 283-84). In addition, Ms. Jones did not require Mr. LeGette to make the initial $20,000 dollar contribution to the Delaware partnership as required by the terms of the agreement (Tr. 341), and she did not make a capital call on Mr. LeGette as further provided for in the agreement (Tr. 342-43). Mr. LeGette simply paid the partnership's bills as they arose. The only record of the partnership's expenses which she maintained were his cancelled checks (Tr. 349-50). When a bill became due, Ms. Jones would call Mr. LeGette, and he would pay the bill (Tr. 342). All the partnership's expenses were paid by Mr. LeGette until an amendment was filed on February 28, 1991, changing the partnership to a Kentucky limited partnership (Tr. 344).

50. Ms. Jones could not recall having a conversation with Mr. LeGette with respect to the financial needs of the Delaware partnership between May 16, 1990 and February, 1991 (Tr. 410). It was Mr. LeGette's idea during this period of time to approach Mr. Glasscock, a limited partner in YBCK, as a potential investor (Tr. 1120). Ms. Jones, Mr. Cohen, Mr. LeGette and Mr. Glasscock met at Mr. Glasscock's office in December 1990 (Tr. 410-11). It was not Ms. Jones' decision to call the meeting, and she does not know who invited Mr. Cohen (Tr. 419-20). She, herself, learned of the scheduled meeting through Mr. Cohen (Tr. 411, 419, 428). Prior to the offer to Mr. Glasscock, Mr. LeGette had been actively seeking other investors for the enterprise, although Ms. Jones had not been informed of that fact (Tr. 1057-58). After the above-referred to meeting, with Mr. Glasscock, Ms. Jones had no further discussions with Mr. Cohen or Mr. LeGette with respect to the search for additional investors (Tr. 431). Mr. Cohen subsequently informed her that YBCK had agreed to take a non-voting interest in the CBLP application, and that he would be working with YBCK on the partnership agreement (Tr. 432-43). Mr. Glasscock informed Mr. Cohen and Mr. LeGette of this fact at a meeting in January 1991, which Ms. Jones did not set up and does not know who did (Tr. 434-45). The discussion as to the terms of the new partnership agreement with YBCK, according to Ms. Jones, was basically between Mr. Cohen and Mr. Glasscock (Tr. 440-42). Mr. Glasscock informed the group that he preferred a Kentucky partnership and a Kentucky lending institution, and these matters were settled between Mr. Cohen and Mr. Glasscock (Tr. 442-43). Counsel then reported to Mr. LeGette on these negotiations (Tr. 1107-08). Mr. LeGette cannot recall any discussions with Ms. Jones with respect to this matter other than at the meetings also attended by Mr. Glasscock and Mr. Cohen (Tr. 1109, 1116-67).

51. The new, Kentucky limited partnership agreement, Ms. Jones believes, was drafted in Mr. Glasscock's office, although Mr. Cohen may have been involved in its drafting (Tr. 433, 493-96), and she did not speak with anyone in Mr. Glasscock's law office as to what should or should not be in the agreement (Tr. 484). Her own attorney was not asked to review it (Tr. 484), and she does not recall discussing the terms of the agreement with Mr. LeGette before it was signed (Tr. 485). Her only concern at the time was that her partnership interest remain the same, and that she be in control of the station's day-to-day operations. Ms. Jones believes that these conditions have been met (Tr. 599-600). The final version of the Kentucky limited partnership agreement was signed by Ms. Jones on the day it was prepared (Tr. 502), and the amendment converting CBLP from a Delaware partnership into the new Kentucky partnership on February 27, 1991. Ms. Jones initially testified that she believed that the amendment came by courier from Mr. Glasscock's office; however, she subsequently changed her testimony to indicate that she received it from Counsel (Tr. 602). A partnership pledge agreement executed in August 1991 (Jenkins, Ex. 25), after the date of the filing of the amendment changing the applicant from a Delaware to a Kentucky partnership, bears on page one of the agreement a notation which, Mr. Glasscock indicated, denotes that the particular document was drafted in his office for his personal account (Tr. 869-70). It would appear, therefore, that Mr. Glasscock continued to perform legal services for the partnership after the signing of the Kentucky limited partnership agreement.

52. The conclusion is inescapable that the CBLP application was prepared and chiefly prosecuted by its purported limited partners; initially by Mr. LeGette and then, after the filing of the amendment adding YBCK to the partnership, by YBCK's limited partner, Mr. Glasscock. The original application was conceived by Mr. LeGette with the assistance of counsel of record. They approached Ms. Jones who accepted without any negotiations the percentage of equity offered to her (Tr. 244, 1000-01). Ms. Jones was not required to do anything to secure the financing for either the prosecution of the application or the necessary loan commitment. She was so disengaged from the entire process that she did not even discuss financial matters affecting the station with Mr. LeGette (Tr. 256), and lacked any knowledge of what Mr. LeGette told the banker with respect to her role at the station, or, indeed, what was told to the banker in order to secure the loan commitment (Tr. 284-85). Furthermore, she had no knowledge of Mr. LeGette's financial status and, apparently little interest, although he had assumed full responsibility for securing the loan and for meeting the costs of prosecuting the application, and she was never asked for her own resume or financial statement (Tr. 1004, 263-64). Once the loan commitment was made, Ms. Jones made no effort to learn the amount of the loan, and she never asked anyone to tell her the amount of the loan (Tr. 283-84). As soon as the application was filed, Mr. LeGette all but ignored Ms. Jones for almost a year until the negotiations began with YBCK, again at the instigation of Mr. LeGette. Throughout the course of the prosecution of this application, Ms. Jones' only concern was to protect the amount of her equity interest and her position as General Manager. This total lack of any meaningful involvement on the part of Ms. Jones, either by her own design or by the wishes of her limited partners, both of which appear to be the case here, persuades the Presiding Judge that Ms. Jones will not be in full control of the station, with sole responsibility for its management. In fact, in view of the considerable involvement of both Mr. LeGette and Mr. Glasscock and the rather dominant position assumed by counsel of record, it appears highly unlikely that these persons will assume the totally passive role with respect to the management of the station required of a limited partner in order to shield its equity interest from consideration. The Presiding Judge concludes, therefore, that CBLP is entitled to only a 25 percent quantitative integration credit, which represents Ms. Jones total amount of equity. This quantitative integra-

tion credit is qualitatively enhanced by Ms. Jones' status as a member of a recognized minority group, and by her long term residence within the service area of CBLP's proposed station with a slight degree of civic involvement. Although Ms. Jones has never held a management position at a broadcast facility, she has been employed as a full-time Sales Assistant and, prior to that, as a Receptionist at a television station in Louisville, Kentucky, positions which have, it can be assumed; given her some knowledge of the workings of a broadcast facility. CBLP is, therefore, entitled to a further, very slight enhancement of its quantitative integration credit for Ms. Jones prior and present employment at a broadcast facility. The application itself is entitled to further comparative credit for its proposal to install an auxiliary power source at its studio and transmitter locations in order to ensure continued operations in the event of a power failure.

## COMPARATIVE COVERAGE

53. The proposals of the applicants will serve the following populations:

| | |
|---|---|
| Mary Anne Embrey | 786,159 |
| Lisa M. Jenkins | 749,337 |
| Q Prime, Inc. | 718,600 |
| Kentuckiana Radio Partners | 749,337 |
| Clarksville Broadcasting Lt. Part. | 761,137 |

There are six existing aural (AM and FM) services to all areas served by all of the applicants (Joint Engineering Exhibit, p. 2).

54. Since none of the applicants will serve any underserved areas, the only possible basis for awarding a comparative coverage preference would be the differences in overall populations served. Comparative coverage preference may be based upon the percentage differences in the populations served. *Beach Broadcasting Limited Partnership*, 6 FCC Rcd. No. 15 4485 (1991).

55. No preference will be awarded for a five percentage difference in coverage, but a 7.5 percent difference merits a minor preference. Embrey will serve 9.40 percent more people than Q Prime, and CBLP will serve 5.58 percent more people than Q Prime. Embrey and CBLP are, therefore, entitled to a very slight preference over Q Prime. With respect to the other Applicants, the percentage differences in population served are all less than 5 percent, and no coverage preference, therefore, can be awarded.

## ULTIMATE CONCLUSIONS

56. As found above, only two Applicants propose a 100 percent quantitative integration of ownership into management, and both of their applications are not subject to a diversification demerit. They are, therefore, clearly the two superior applicants among the five which seek the permit for the Clarksville, Indiana facility. Being equal on all other comparative aspects, the decision as to which of the two advances the superior proposal will turn on the degree to which their quantitative integrations credits are qualitatively enhanced. Both Applicants are long term residents of the service area. Furthermore, Ms. Embrey has lived within the city of license since 1989, and Ms. Jenkins lived in Clarksville, Indiana from 1976 until 1985. Ms. Jenkins' civic involvement within the service area is slightly more significant and of more recent vintage than Ms. Embrey's. In addition, she has some broadcast experience. Although a very close call, Ms. Embrey's actual residence within the city of license at present and for the foreseeable future entitles her application to a very slight comparative advantage over that of Ms. Jenkins, despite the fact that Ms. Jenkins has had some broadcast experience, formerly lived within the city of license and has been involved to a slightly greater extent and, more recently, in the civic affairs of the service area. The Presiding Judge finds, therefore, that Ms. Embrey's application is slightly superior to that of Ms. Jenkins, and her application will be granted.

## RULINGS

IT IS ORDERED, for good cause shown, that the Motion to Accept Proposed Findings of Fact and Conclusions on Behalf of Mary Anne Embrey, filed on April 22, 1992 IS GRANTED, and the late filed pleading IS RECEIVED.

And, IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of §1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Mary Anne Embrey d/b/a Clarksville Radio (File No. BPH-89083MF) for authority to construct a new FM station or Channel 226A in Clarksville, Indiana IS GRANTED; and that the applications of Lisa M. Jenkins (File No. BPH-890905MA), Q Prime, Inc. (File No. BPH-890905ME), Kentuckiana Radio Partners (File No. BPH-890905MO), and Clarksville Broadcasting Ltd. Partnership, (File No. BPH-890905MU) ARE DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

WILLIAMS TELECOMMUNICATIONS
GROUP, INC.,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-90-455

**ORDER**

**Adopted: February 2, 1993; Released: February 10, 1993**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 11, 1990, Williams Telecommunications Group, Inc. (WTG) filed the above-captioned formal complaint against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On January 28, 1993, however, WTG filed a motion to dismiss the complaint with prejudice stating that the parties have reached a full and complete settlement and there is no further reason to proceed in this matter.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Complainant's Motion to Dismiss with Prejudice IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
and Investigations Branch
Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

DANIEL FORRESTALL, RECEIVER FOR
ALL AMERICAN BROADCASTING COMPANY
(Assignor)

and File No. BALH-901015HV

ALL AMERICAN BROADCASTING, INC.
(Assignee)

For Assignment of the License of
Station KNTO(FM), Livingston,
California

## MEMORANDUM OPINION AND ORDER

**Adopted: February 3, 1993; Released: February 10, 1993**

By the Chief, Video Services Division:

1. The Chief, Video Services Division, here considers: (a) the application of Daniel Forrestall, Receiver for All American Broadcasting Company (Forrestall), to assign the license of station KNTO(FM), Livingston, California, to All American Broadcasting, Inc. (All American); (b) a petition to deny the application submitted by Robert Jones (Jones); and (c) related pleadings.

## INTRODUCTION

2. All American is a corporation with two shareholders. Nelson F. Gomez (Gomez) owns 69% of the voting stock, and William Colclough (Colclough) owns the remaining 31%. Both Gomez and Colclough have had significant involvement with KNTO(FM) over the past several years. Petitioner Jones alleges that Gomez and Colclough controlled the station without Commission authorization before the filing of the instant assignment application. He also alleges that Gomez and Colclough have misrepresented to the Commission facts regarding their unauthorized control of the station. Finally, he asserts that Gomez and Colclough have misrepresented a material matter in the assignment application by failing to disclose the existence of an understanding related to a future ownership interest promised to Jones.[1] However, we turn our attention first to the allegations of an unauthorized transfer of control and then to the allegations relating to misrepresentation.

## UNAUTHORIZED TRANSFER OF CONTROL

### Before the Receivership

3. *Background and Pleadings* On January 16, 1981, a construction permit for unbuilt station KNTO(FM) was awarded to Colclough, Robert J. Parreno (Parreno), and R. C. Duckett (Duckett), a Joint Venture d/b/a All American Broadcasting Company.[2] According to a September 8, 1981 ownership report, Duckett and Colclough each controlled 45% of the company, while Parreno controlled the remaining 10%. In 1984 the permittee applied for a license to cover its construction permit, and it was granted on January 19, 1988.[3]

4. In the course of this proceeding, we requested Gomez, Colclough, and Forrestall, by letter dated November 8, 1991, to provide information concerning the station since February 1, 1988. They responded by letter dated December 20, 1991, supplying the following information. In September of 1986, local attorney Gomez accepted Colclough and Duckett's proposition that he buy into the station. In January of 1987, Duckett, Colclough, and Parreno reached a settlement regarding the station's ownership. Under the terms of this settlement, Parreno received $12,500 for his interest in the company, and Colclough and Duckett were prohibited from reselling Parreno's former interest for at least one year. Gomez paid $10,000 of the $12,500 that purchased Parreno's interest, and Gomez and Colclough assert that they had an understanding that Gomez would acquire a partnership interest at the end of the contractual one-year prohibition. By November of 1987, Gomez had contributed approximately $60,000 toward the station's expenses. At this point Gomez, Colclough, and Duckett, by informal agreement, considered themselves the owners of the station, although Gomez asserts that he acted like a passive investor.[4]

5. Subsequently, the relationship among the principals apparently deteriorated to the point that Duckett no longer recognized Gomez's alleged rights in the business, and Gomez's participation appears to have become more active. In December of 1987, Gomez and Colclough demanded that Duckett discontinue his responsibility for the station's day-to-day operations. Gomez and Colclough changed the station and post office locks in order to prevent Duckett from exercising authority over the station. Colclough also began to arrange to have the station's records transferred to his office in Santa Rosa, California, approximately 130 miles from Livingston. On February 1, 1988, Gomez and Colclough obtained from a California state court a temporary restraining order (TRO) against Duckett. The TRO

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[1] None of Jones' allegations concerning misrepresentation or unauthorized control of the station meets the statutory pleading burden. *See Citizens for Jazz*, below. Nevertheless, in our discretion, we shall address the issues raised by the petitioner.

[2] File No. BPH-790117AB. The joint venture operated as a partnership.

[3] Although the license to cover the construction permit was not issued until 1988, Colclough asserts that KNTO(FM) commenced operations in September, 1984, pursuant to program test authority.

[4] Pursuant to Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules, a permittee must request (by a Form 316 application) authorization for the addition of a new partner where there will be no transfer of control. Although denominated a joint venture, the entity created by the parties is effectively the equivalent of a partnership agreement. Thus, the addition of a "joint venturer," under the circumstances of this case, similarly required prior Commission approval.

prohibited Duckett and any employee hired without Gomez and Colclough's consent from: issuing checks or drafts drawn against All American Broadcast Company; withdrawing funds from any of the company's bank accounts; or obstructing Gomez and Colclough's employees from managing the station. However, according to Gomez and Colclough, Duckett retained his partnership voting interest.

6. In response to the TRO, Gomez sent a memorandum dated February 9, 1988, to the station's staff, informing them that he was owner and general manager of the station.[5] However, on February 24, 1988, allegedly before Gomez actually took control of the station, a court order was issued stating that Colclough (but not Gomez) would manage the station pending trial. The order also stated that Duckett was to have free access to the station.

7. Over the next several months, Duckett increased his involvement at the station, to the exclusion of Colclough's oversight. According to Gomez and Colclough, Duckett's increased influence was possible because Colclough lived so far away from the station and was not able to be there on a full-time basis. In April of 1989, Duckett, who by then had apparently become the station's general manager, was introduced to Daniel Forrestall, a professional consultant. Forrestall began performing services for the station. On September 2, 1989, Duckett hired Robert Jones as the station manager.[6]

8. Continuing their response to the staff inquiry, Gomez and Colclough claim that, during the period before the station went into receivership, either Colclough, Duckett, or their designees: had control over the station banking accounts; prepared and signed station checks; prepared and kept the station's books and records; purchased equipment for the station; obtained programming; signed station contracts; interviewed prospective employees; determined salaries and sales commission levels for station personnel; and negotiated and approved advertising sales contracts. However, the assignees state that from February 1 until February 24, 1988, while the TRO was in effect, responsibility for certain station activities was delegated to other employees. Specifically, office manager Marabella Quitero made regular deposits into station accounts, and acting on-site station manager Tony Franconi obtained programming, signed employment and programming contracts, and interviewed prospective employees. We note that Gomez and Colclough do not state who delegated such authority to Quitero and Franconi.

9. In support of his allegation that Gomez exercised control over the station, Jones submits the declaration of Francisco Martinez, KNTO(FM)'s program director from 1984-1988. Martinez asserts that Gomez appointed the station's accounts manager in January, 1988. He also claims that Gomez replaced him as program manager. Specifically, according to Martinez, Gomez posted at the station, in February, 1988, a notice written on his law office letterhead announcing the hiring of a new program director to replace Martinez. In response, Forrestall, the Receiver, claims that Martinez's statements are based on his personal friendship with the petitioner and on his resentment at having been fired by the Receiver after Martinez's 1990 return to the station.

10. Gomez and Colclough assert that the legal dispute between them and Duckett made it impossible to determine whether any change in partners or partnership rights had actually occurred during this period. They also claim that, to the extent that Gomez obtained or exercised partnership rights that required either a report to or the consent of the Commission, the "FCC ramifications" of their actions were not "primary in their minds." Finally, they note that they did not have communications counsel at that time. Therefore, they claim, they neither reported any possible change in the partnership rights of the licensee during this period in the station's annual ownership reports, nor did they seek Commission consent to any such change.

11. *Discussion* Section 309(d) of the Communications Act of 1934, as amended, imposes burdens on petitioners that wish to participate formally in Commission application proceedings. Petitioners must allege specific facts, and those facts must be matters of which we can take official notice or be supported by an affidavit from a person with first hand-knowledge of the facts alleged. Affidavits based on "information and belief," and information set out in newspapers or magazines do not meet statutory requirements. Using facts that meet those requirements, a petitioner must establish a *prima facie* case that a grant of the application would be inconsistent with the public interest. If such a case is established, we then turn to the facts set out by the applicants to determine, in light of all the facts, whether a substantial question of fact has been raised with respect to the public interest determination. *See generally Citizens for Jazz on WRVR, Inc. v. F.C.C.*, 775 F.2d 392 (D.C. Cir. 1985); and *Stone v. F.C.C.*, 466 F.2d 316 (D.C. Cir. 1972).

12. In addition, Section 310(d) of the Communications Act prohibits the transfer of a construction permit or station license without prior Commission consent. The Commission has often recognized that there is no exact formula by which "control" of a broadcast authorization can be determined. In ascertaining whether a transfer of control has occurred, the Commission has traditionally looked beyond the legal title to whether there are any actions reflecting a new entity or individual with the right to determine the basic policies and ultimate control of the station. *See WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). In most instances, the question of control involves an issue of fact that must be resolved by examining the specific circumstances presented. *See, e.g., Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 821 (1975). Nevertheless, over the years, the Commission has established certain guidelines in this area, including whether control of the station's finances, its personnel, and its programming have shifted to a new entity or individual. While the indispensable component of control is the ability of a permittee or licensee to exercise full responsibility over all matters involving the construction and operation of the station, it should be emphasized that certain duties

[5] Although Jones did not submit a copy of this document as we would generally require, Gomez and Colclough, in their Opposition, confirm its existence.

[6] On approximately January 1, 1990, the Receiver made Jones the station's general manager.

and responsibilities can be delegated to third parties. In fact, the Commission has held that the day-to-day operation of a station by an agent or employee, when guided by policies set by the licensee, is not inconsistent with the Communications Act. *See Alabama Educational Television Commission*, 33 FCC 2d 495, 508 (1972). Although a permittee or licensee may delegate certain functions to others, it may not abdicate ultimate responsibility to determine the manner or means of operating the station. The question before us, therefore, is whether there is a substantial and material question of fact as to whether Duckett, Parreno, and Colclough abdicated this duty before the Commission authorized the assignment to Forrestall.

13. The material allegations before us show that the partners of the licensee to some extent acted as if Gomez had partnership rights in the company from February 1 to February 28, 1988. The parties did not submit an application to authorize such a transfer of control, as required by the Communications Act and the Commission's Rules. However, we note that the duration of Gomez's control was very short and was in response to a court order. We also note that the principals took care to remedy the situation more than two years before the Commission became aware of it. Moreover, nothing in the record contradicts the statement that Duckett retained his voting rights. Further, nothing in the record suggests that Gomez, during this period, acted on his own or inconsistently with the agreement. Due to these mitigating circumstances, we do not believe that any further action on our part is warranted at this time.[7]

**During the Receivership**

14. *Background and Pleadings* By order released October 16, 1989, the state court appointed Forrestall as Receiver. The Commission authorized the *pro forma* assignment to the Receiver on November 27, 1989.[8] Several months later, the California court resolved the dispute among the partners in a stipulated judgment issued on May 21, 1990, and released on June 11, 1990.[9] The judgment granted Duckett the opportunity to buy out the remaining partnership shares. The order also stated that if he did not act by July 5, Gomez and Colclough could purchase the remaining partnership shares. When Duckett did not pay his second installment toward purchase of the shares, Gomez and Colclough initiated the process of purchasing Duckett's interest.[10] The court released an order on July 31, 1990, that permitted the Receiver to sell the station to Gomez and Colclough, pursuant to the stipulated judgment.[11] In August of 1990, Gomez paid Forrestall $12,500 toward outstanding receiver fees. According to the parties, the station was having financial problems at this time.

15. On August 10, 1990, Forrestall, petitioner Jones, Gomez, and Colclough held a meeting to discuss station business. According to the Receiver, he stated at the meeting that he would allow Gomez and Colclough to work in management positions with Jones, under the direct guidance of the Receiver.

16. On August 27, 1990, Gomez and Colclough sent Jones a letter discussing in detail their plans to "take over the management" of the station on September 1 and explaining those changes that would be "different than what has been required by the Receiver." The letter stated that Gomez and Colclough had opened a new checking account and required that all station deposits be made into this account. Gomez and Colclough also stated that they "wish[ed] to be consulted in advance before any new employee is hired, existing employee is discharged or changes made in any pay rate." In addition, they requested Jones to "have two complete sets of station keys made for our personal use." The letter also required that all advertising sales contracts, billing statements, accounts receivable records, and other business records be sent or faxed to their "accounting office."

17. Forrestall gave Jones a letter dated September 4, 1990, in which he notified Jones that, under his authority as the court-appointed Receiver, he had given Gomez and Colclough "permission to assume a direct and active role in the management of KNTO as of September 1, 1990." The letter also stated that "as of that date, Mr. Gomez and Mr. Colclough will have all the authority necessary to make daily business, personnel, and operating decisions involving the daily operations of KNTO." Forrestall continued that Jones would report to Colclough instead of the Receiver. The letter refers to Gomez and Colclough as the "new owners" and states that they would provide the Receiver with a formal report outlining the station's operations on a monthly basis "pending approval of the Federal Communications Commission license transfer [sic]."

18. On September 7, 1990, Gomez held a meeting at his law office with Colclough, Pam Fishtrom (the employee in charge of keeping station records), and Murlene House (the station's office manager). Jones asserts that at this meeting Gomez told Jones to deal only with him. Jones also states that Gomez informed him that salary increases for station employees were forthcoming.

19. On September 10, 1990, Jones and House met with the Receiver to discuss what they considered detrimental interruptions at the station by Gomez and Colclough. According to Jones, Forrestall told them to cooperate with Gomez and Colclough. The petitioner also asserts that Forrestall informed him that he would not pay Jones his August bonus.

20. Gomez then sent Jones a letter dated September 21, 1990, in which he informed the petitioner that he would deposit "sufficient funds into the station's account" to cover certain payroll expenses. He also told Jones that he understood that Colclough had sent the payroll checks for the station's secretary and hourly employees, adding that he believed that Colclough had done this because of the station's revenue shortfall. Gomez also related his general

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[7] As noted above, Commission approval of Gomez's admission to the partnership would have been accomplished by *pro forma* procedures, because he did not have a controlling interest.

[8] File No. BALH-891101HJ.

[9] Under the terms of a settlement agreement, Duckett has not participated and has not submitted any pleadings in the instant assignment application.

[10] The parties dispute whether the terms of this court order restrict Jones from petitioning against the instant application. However, that involves a private dispute concerning state law over which we have no jurisdiction. Such a private dispute is more appropriately heard in local courts or other forums. *See Mid-Texas Broadcasting, Inc.*, 71 FCC 2d 1173 (1979). Whatever action the court may take regarding Jones' participation does not limit our ability to consider the substance of his pleading.

[11] Duckett filed an appeal of this order on September 7, 1990.

understanding and expectations regarding the revenue collection efforts of the station's staff. Specifically, Gomez's letter stated that "I have made it clear to you [Jones] in our conversation of today that we [Gomez and Colclough] expect performance from you and that we will step in and put additional dollars to insure payment of the expenses for the radio station, but only after all the efforts have been made by the employees for the collections... [W]e are expecting a collection in the numbers I have stated above... I must not say any more with regards [sic] to the consequences in the event that collections drop off significantly. We are performance oriented and will reward employees based on performance. We will also make decisions with regards [sic] to personnel matters based on the same grounds."

21. Then, on September 27, 1990, when several station employees were paid three days late, Jones wrote a letter to Gomez and Colclough, holding them responsible. His letter also discussed collections and bonuses, asking Gomez and Colclough as the new owners to act on his requests. By October 7, 1990, when the staff payroll for the end of September had not yet been received, Jones and House called the Receiver. They assert that Forrestall "seemed totally removed" from the situation. According to Jones and House, the Receiver stated that he would check into their problems only after the end of the month, when he would receive a written report from Gomez and Colclough. In response, Jones sent a letter dated October 8 to the Receiver complaining about, among other things, Gomez and Colclough's not paying the staff on time. According to Jones, Forrestall never responded to this letter.[12] Finally, on October 15, 1990, Forrestall filed the instant assignment application. According to Jones, the Receiver reasserted control over the station at this point. Jones filed his Petition to Deny on November 15, 1990.[13]

22. In support of his assertion that Gomez and Colclough controlled the station without Commission authorization, Jones submits the statement of Francisco Martinez (see paragraph 9), who had by this time returned to the station as a consultant. Martinez claims that on October 2, 1990, Gomez held a meeting at his law office with Colclough and the station's management staff.[14] According to Martinez, each manager was asked what she or he needed from the owners and was promised that it would be given. Martinez also states that they were told that Colclough would run the station's day-to-day operations, but that all decisions would be made jointly with Gomez. Finally, he alleges that Gomez authorized him to order several broadcasting cartridges, which were to be delivered to Gomez's office. In response, Forrestall alleges that Martinez is generally unreliable (see paragraph 9). In addition, the Receiver asserts that he, rather than Gomez, authorized the purchase of the new broadcasting cartridges.

23. In their affidavits, Gomez and Colclough state that the August 27, 1990 letter discussing their plans to take over the management was simply a request for financial records and information. According to the assignees, the letter was sent to help them establish the station's financial needs in response to the Receiver's having requested an infusion of capital. The assignees also claim they were attempting only to monitor the station as future owners, rather than control it. In that regard, the Receiver asserts in his affidavit that he retained control over all of the station's personnel, financial, and business affairs. Forrestall also claims that recordkeeping and documentation have always remained at his Sacramento office. However, Gomez and Colclough assert that recordkeeping has been done at Colclough's Santa Rosa office by Pam Fishtrom, an employee of Colclough who had performed that function before the imposition of the receivership. Fishtrom states that she ceased keeping the station's books when Forrestall became Receiver, but that she resumed her job in September, 1990, upon Forrestall's request. Gomez and Colclough maintain that Forrestall, acting independently of them, requested Fishtrom to continue keeping the books after the court appointed him as receiver. They add that Colclough does not oversee or supervise Fishtrom in her bookkeeping duties.

24. Gomez and Colclough also state that, since the station went into receivership, they have not possessed the station checkbook, signed a station check, or made any financial, personnel, or programming decisions. In addition, Gomez and Colclough assert that they have not tried to manage or influence personnel decisions, programming, or finances. Gomez adds that he has not entered the station since the Receiver took over. Colclough claims that he made two visits to the station with the Receiver's advance knowledge. With regard to the station keys, Gomez and Colclough state in their affidavits that they have not used them. In addition, Forrestall asserts that Jones has informed the California Employment Department, the Internal Revenue Service, and a state administrative law judge that he worked under Forrestall's control from October, 1989 until November, 1990, thereby demonstrating that Gomez and Colclough did not control the station.

25. Finally, Gomez and Colclough assert that the arrangements outlined in their letter never took place, because Jones refused to submit the requested documents to them. Therefore, they claim, they never reviewed any station financial records, advertising contracts, billing invoices, or employment contracts, nor did they make any decisions relating to such documents.

26. Jones alleges that Gomez and Colclough did review such documents during September and October of 1990. The petitioner submits an October 4, 1990 letter from Fishtrom to House, a copy of which was faxed to Gomez.[15] In this letter Fishtrom requests information concerning

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[12] Jones and House assert that they and another station employee have pending a claim with an unspecified "Labor Board" for sums due them.

[13] Forrestall fired Jones from his position as general manager two weeks later, on November 28. The Receiver states that Jones demonstrated malfeasance in his job and was accordingly fired, and that Jones' filing of the petition to deny was unrelated to the decision to terminate him. Although the parties dispute the reason for Jones' termination and whether Jones and House mismanaged station funds, these issues have no bearing to the matters before us.

[14] Jones asserts that Gomez and Colclough hired Brian Dalben as sales manager at this meeting. However, that allegation is not properly supported. Further, Gomez and Colclough state in their affidavits that Dalben falsely told them at the meeting that he already held that position, and that they merely acknowledged his statement.

[15] On January 24, 1992, Jones submitted this document, along

employee paychecks and other business expenses. In her October 5 reply, House informs Fishtrom that payroll information had been given to Colclough on October 2, that Gomez had approved a $300 bill for carpet cleaning, and that she would soon send copies of documents requested by Colclough. Jones further submits a September 21 note from House to Gomez (and Fishtrom) containing information about the station's bank account.

27. Gomez and Colclough respond that, to the extent that Forrestall and station employees provided them with payroll and bank deposit information during September and October of 1990, it was consistent with their contemplated financial monitoring plan. They assert that there is no evidence that they assumed responsibility for reviewing financial records or that they made financial decisions for the station.

28. Jones also submits an advertising contract signed by Colclough dated February 14, 1991. Colclough asserts in his affidavit that he did not recall executing the contract until Jones submitted it in his pleadings. According to Colclough, the advertiser was located in Santa Rosa and was referred to him by a business acquaintance who was unaware of his uncertain legal status with the station. Colclough claims that he executed the contract in order to save a station employee from making the seven hour round trip from Livingston. Gomez and Colclough argue that the signing of that contract does not suggest that either of them controlled the station.

29. Next, Jones submits a letter dated February 1, 1991, from Colclough to KNTO(FM)'s general manager Jesus Cruz, with detailed information about advertising accounts and payments. Specifically, Colclough informed Cruz which advertisers needed his attention and told him the expiration dates of several other advertising contracts. Colclough also requested an explanation or a contract for four enumerated advertisers, stating that he had no record of receiving a contract from any of them.

30. Gomez and Colclough argue that this note was directly related to Colclough's assisting the Receiver in the reconstruction of the station's books following the alleged mismanagement by House and Jones. The assignees state that Forrestall requested Colclough's help due to the latter's experience with the station, having been one of its original owners. Colclough contends that he performed this function on only one occasion, shortly after Jones' November 28, 1990 termination.

31. Colclough also states that he was present as an observer when the Receiver hired Cruz to replace Jones as general manager. However, Colclough contends in his affidavit that Forrestall asked almost all of the questions, and that he played no role in the Receiver's hiring decision.

32. With regard to the station's second checking account, Forrestall, Gomez, and Colclough assert in their affidavits that the Receiver authorized its opening. They claim that Gomez, Colclough, and Forrestall were signatories to the account. Gomez and Colclough explain the opening of the new account as a method to speed the transition to their new ownership. Also, the Receiver alleges that a mishandling of funds by House and Jones necessitated the opening of the new account. Gomez and Colclough claim they never sought or obtained access to this account, and that they never signed any station checks. Forrestall asserts in his affidavit that he authorizes all checks, and that all station expenses are paid with checks that either he or the station's bookkeeper signs.

33. *Discussion* We must determine whether there is a substantial and material question of fact as to whether Forrestall abdicated his ultimate responsibility to determine the manner and means of operating the station to Gomez and Colclough. In *Phoenix Broadcasting Co.*, 44 FCC 2d 838 (1973), the Commission cautioned prospective purchasers to refrain from taking any actions, such as assuming general managerial functions or lending funds, that could result in the premature exercise or assumption of control of the station involved. However, the Commission also stated that prospective purchasers could in some instances furnish funds and act in varying capacities in the operation of the station, under supervision of a court-appointed trustee in bankruptcy. In *Fine Arts Broadcasting, Inc.*, 57 FCC 2d 108, 111 (1975), while the Commission did not find an unauthorized transfer of control, it warned prospective purchasers not to assume managerial positions at the station they seek to buy except under the most compelling circumstances.

34. The evidence before us demonstrates that Forrestall, while delegating authority to others, retained control of KNTO(FM). We find that Gomez and Colclough's actions are consistent with the authority delegated to them by the Receiver/licensee and that they did not exceed that authority. We also note that the Receiver took affirmative actions as licensee, such as terminating Jones' employment, hiring his replacement, and opening the station's second checking account. Moreover, even under the set of facts asserted by Jones, if there were an unauthorized transfer of control, it lasted only a very short period of time[16] and was corrected by the applicants before the Commission was made aware of it. Under these circumstances, we find that mitigating factors preclude the need for any action at this time that would disqualify Gomez and Colclough from holding a Commission license. *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981). Accordingly, we turn to the allegations of misrepresentation raised by the petitioner.

## MISREPRESENTATION

### Future Ownership Interest to Jones

35. *Background and Pleadings* Jones asserts that Gomez and Colclough have misrepresented a material matter in the assignment application by failing to disclose the existence of an understanding related to a future ownership interest promised to Jones. Specifically, at an August 10, 1990 meeting among Gomez, Colclough, Jones, and Forrestall, according to the petitioner, either Gomez or Colclough stated that Jones would receive about 5% ownership in the station if he would continue to perform successfully for six months and agree to stay on afterwards.

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with several others, in late-filed comments to the applicants' response to a staff letter. The assignees have requested that we strike that pleading as untimely. However, in our discretion, we shall accept the petitioner's pleading, due to the importance of the matters before us.

[16] The bulk of the petitioner's allegations in this matter concern events occurring during September and October of 1990. As stated above, Jones asserts that the Receiver controlled the station after October 16.

In addition, Jones asserts that Gomez and Colclough told him several times that he would get an ownership interest only after Commission authorization of an assignment to them, because the July 31, 1990 court order allowed a sale only to them. At an August 14, 1990 meeting between Gomez and Jones, according to Jones and House, Gomez told Jones that 5-10% ownership would not be too much, if he continued performing well. The petitioner has also submitted a letter dated August 13, 1990, from Forrestall in which the Receiver advises Jones on how best to approach Gomez and Colclough about a possible ownership percentage.[17]

36. On August 23, Jones sent a letter to Gomez stating his desire for a written commitment to clear up his doubts regarding his possible ownership share. Jones wrote Gomez again on September 4, stating that he had not received any response to his August 23 request and again asking for a written commitment. Finally, on September 7, Gomez discussed the situation in a letter to Forrestall. In that letter, Gomez stated that it was his and Colclough's "intent to sit down with Robert Jones once we obtain the license from the FCC to explore the possibilities of some equity position for Mr. Jones as a result of our continued involvement with him. However, I am unable to make a decision with regards to Mr. Jones' ownership of the station until such time as the FCC has granted the license" to the assignees.

37. The petitioner argues that this series of letters, the assignees' oral statements, and the August 27, 1990 letter from the assignees to Jones[18] demonstrate that they had reached an understanding concerning future ownership of the station. The assignees ended the August 27 letter by telling Jones that they looked forward to his continuing successful association with the station. Jones interprets the September 7 letter to be the written response he had requested on September 4. The petitioner also interprets Gomez's September 7 letter to mean that, while he had already agreed to give Jones an interest in the station, he had not yet decided the precise equity interest Jones would receive.

38. In response, Forrestall, Gomez, and Colclough assert that no such understanding ever existed. Moreover, they contend that the letters Jones has submitted demonstrate that no such understanding existed. According to the assignees, the September 7 letter demonstrates that they had not considered even discussing such an agreement until after Commission authorization of the instant application.

39. *Discussion* Misrepresentation consists of two elements: a false statement and an intent to deceive. *See, e.g., Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). We find that the letters submitted by the petitioner demonstrate that Gomez and Colclough had no understanding with Jones regarding future ownership of the station. In fact, these letters show that, if certain conditions were met, then an ownership interest might be considered. It appears that Jones sought a written agreement precisely because no understanding had been reached. We are also persuaded by the assignees' interpretation of the September 7 letter. Therefore, we find that neither element of misrepresentation has been met, and, therefore, that the petitioner has not raised a substantial and material question of fact regarding misrepresentation or lack of candor in connection with future ownership of the station by Jones.

**Other Allegations**

40. Jones argues that Gomez and Colclough's statements denying that they controlled the station during the receivership are misrepresentations. We disagree, based upon our above finding that no unauthorized transfer of control occurred. We also reject the petitioner's claim that Gomez and Colclough made a misrepresentation when they stated that they had not received keys to the station, when, in fact, they had. Gomez and Colclough mentioned in an earlier pleading that they had received the keys, then stated in another pleading that they had not received them. Then, after Jones asserted that they had received the keys, they asserted that, in making the latter assertion, they had forgotten that they had received the keys because they had never used them. We find that explanation plausible, and that the petitioner has failed to demonstrate an intent to deceive the Commission.

41. Finally, Jones alleges that the Receiver misrepresented that the station had five or fewer employees in his 1990 employment report to the Commission.[19] Jones notes Forrestall's comment in a pleading that the station hired approximately 15 people. Forrestall responds in his affidavit that the station at the time of his report hired only one person full time, while hiring others part time or as independent contractors. Therefore, he asserts, his report was accurate. Based upon the information before us, we find that Jones has not made a *prima facie* case of misrepresentation in the employment report.

**CONCLUSION**

42. We conclude that the petitioner has not made a *prima facie* case that grant of the assignment application would not serve the public interest. We further find that the assignee is fully qualified in all respects to operate station KNTO(FM).

43. Accordingly, IT IS ORDERED that the petition to deny submitted by Robert Jones IS DENIED.

44. IT IS FURTHER ORDERED that the application for the assignment of the license of station KNTO(FM), Livingston, California, from Daniel Forrestall, Receiver, to All American Broadcasting, Inc., IS GRANTED.

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[17] Jones has also submitted the statement of Susan Woods, a former employee at Forrestall's consulting company. Woods states that Forrestall told her that he thought Jones would at some time earn an ownership interest in the station. She adds that Forrestall also told her (apparently before Gomez and Colclough sought to purchase the station) that anyone interested in purchasing the station would be made aware that Jones was to be given a percentage. Those statements are not clear and specific. Moreover, future ownership agreements need not be submitted to the Commission until they are past the stage of preliminary negotiations. *See David A. Davila*, 5 FCC Rcd 5222, 5225 (Video Services, 1990), *review denied*, 6 FCC Rcd 2897 (1991), *appeal pending sub nom., Gonzalez v. F.C.C.*, Case No. 91-1292 (D.C. Cir., argued Jan.19, 1993). Here, there appears not to have been a meeting of the minds concerning Jones' future ownership. Accordingly, we do not find Woods' statement to be evidence of misrepresentation by Gomez and Colclough.

[18] *See* ¶ 16.

[19] The Annual Employment Report (Form 395-B) requires extensive personnel information when a station has five or more full-time employees.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MD Docket No. 92-92**

In the Matter of

Establishment of
Systems of Records
Exempt Under the Privacy Act

## REPORT AND ORDER

**Adopted: January 22, 1993; Released: February 10, 1993**

By the Commission:

1. On April 16, 1992, we adopted a *Notice of Proposed Rule Making* (NPRM)[1] proposing to amend section 0.561 of the Commission's rules to exempt two new systems of records[2] from certain provisions of the Privacy Act of 1974, 5 U.S.C. Section 552a. In particular, we proposed to establish two systems of records entitled "FCC/OIG-1, Criminal Investigative Files" and "FCC/OIG-2, General Investigative Files."

2. The first system of records is limited to records on individuals, including present and former FCC employees, who are or have been the subjects of criminal investigations conducted by the Office of Inspector General (OIG) pursuant to the Inspector General Act of 1978, as amended, 5 U.S.C. Appendix 3. These criminal investigations concern alleged violations of criminal laws which proscribe fraud and abuse in the execution of the Commission's programs and operations. We proposed to exempt this system of records from all of the provisions of the Privacy Act except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (e)(7), (e)(9), (e)(10), (e)(11) and (i).[3] The second system of records will contain investigative material compiled for general law enforcement purposes. We proposed to exempt this system of records from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

3. No parties filed comments in response to the *NPRM*. In accordance with the requirements of 5 U.S.C. Section 552a(j)(2) and 552a(k)(2), and for the reasons detailed in the *NPRM* in this proceeding, we conclude that the amendment to Section 0.561 of the Commission's Rules set forth in the *NPRM* should be adopted as proposed.

4. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, 47 U.S.C. Sections 154(i), 303(r), and Sections (j)(2) and (k)(2) of the Privacy Act, 5 U.S.C. Sections 552a(j)(2), (k)(2), the attached amendment to Section 0.561 of the Commission's Rules, 47 C.F.R. Section 0.561, IS ADOPTED. This rule will become effective 30 days from the date of publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX

Part O - COMMISSION ORGANIZATION

1. The authority citation for Part O continues to read as follows:

**AUTHORITY: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.**

2. Section 0.561 is amended by adding new paragraphs (f) and (g) to read as follows:

Section 0.561 Exemptions.

* * * * *

(f) System name. Criminal Investigative Files--FCC/OIG-1. Compiled for the purpose of criminal investigations. This system of records is exempt under the provisions of section (j)(2) of the Privacy Act because the records contain investigatory material compiled for criminal law enforcement purposes.

(g) System name. General Investigative Files--FCC/OIG-2. Compiled for law enforcement purposes. This system of records is exempt under the provisions of section (k)(2) of the Privacy Act because the records contain investigatory material compiled for law enforcement purposes.

## FOOTNOTES

[1] *In the matter of Establishment of Systems of Records Exempt Under the Privacy Act*, Notice of Proposed Rule Making, MD Docket No. 92-92, 7 FCC Rcd. 3123 (1992).

[2] A system of records is a group of records under an agency's control from which information is retrieved by the individual's name or by some other unique personal identifier, such as social security number. *See* 5 U.S.C. Section 552a(a)(5).

[3] In general, these provisions allow the disclosure of information from systems of records pursuant to the Freedom of Information Act or pursuant to a court order, to agency employees on a "need to know" basis, to Congress, to certain agencies such as the Bureau of Census and the National Archives, and to law enforcement agencies when the information is requested by the head of such agency. Further, these provisions set forth certain administrative and accounting requirements that agencies must meet in connection with systems of records pertaining to criminal investigations.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**GEN Docket No. 90-357**

In the Matter of

Amendment of the Commission's
Rules with regard to the
Establishment and Regulation of
New Digital Audio Radio Services

**ORDER DENYING MOTION FOR EXTENSION OF TIME TO FILE COMMENTS**

**Adopted: January 29, 1993; Released: January 29, 1993**

**Comment Date: February 3, 1993**
**Reply Comment Date: March 1, 1993**

By the Office of Engineering and Technology:

1. On January 15, 1993, Digital Satellite Broadcasting Corporation (DSBC) requested that the deadline for commenting on that portion of the *Notice of Proposed Rule Making and Further Notice of Inquiry* (*NPRM/FNOI*) in GEN Docket No. 90-357 that addresses technical standards be postponed until after the Commission considers DSBC's *Request For Establishment Of An Advisory Committee To Negotiate Proposed Regulations* filed January 19, 1993.

2. DSBC argues that if its request to convene an Advisory Committee is granted, comment on technical issues in response to the *NPRM/FNOI* will be unnecessary. DSBC also maintains that postponing the comment deadline on technical issues would not impair or delay this proceeding, nor would the interests of other parties be affected negatively. In opposition to DSBC's request, Satellite CD Radio, Inc. (SCDR) argues that DBSC has failed to establish why the pendency of a negotiated rulemaking justifies delaying consideration of technical issues in this proceeding; that public comment would assist the Commission in proposing additional rules if it elects to do so; and that if the Commission elects to establish an Advisory Committee, filing comments would in no way hinder such a proceeding.[1]

3. The Commission does not routinely grant extensions of time.[2] In the *NPRM/FNOI* the Commission solicited comment on a wide variety of subjects, including technical issues, that are related to the possible allocation of spectrum for both satellite and terrestrial digital audio radio services (DARS). The Commission did not propose specific technical standards in the *NPRM/FNOI*, and explicitly stated that such standards would be the subject of future action.[3] The comment solicited regarding technical issues will assist the Commission in its deliberations on allocating spectrum and in formulating its policy to deal with the technical and regulatory issues related to both satellite and terrestrial DARS. In addition, as the Commission stated in the *NPRM/FNOI*, comment on technical matters also will serve to update the Commission's record on DARS technical developments. Therefore, we find that comment on technical issues in this proceeding would be beneficial. Accordingly, IT IS ORDERED, that the request to postpone the comment deadline in this proceeding is DENIED.

4. In accordance with 47 CFR Section 1.46(b), any interested party may file comments on technical matters until February 3, 1993.

5. This action is taken pursuant to authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 USC Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241, and 1.46. For further information, contact Damon C. Ladson, Office of Engineering and Technology, (202) 653-8106.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

[1] *See Opposition of Satellite CD Radio, Inc. To Motion For Extension Of Time To File Comments*, GEN Docket No. 90-357 (January 28, 1993).
[2] 47 CFR Section 1.46(a) (1991).
[3] *See NPRM/FNOI*, 7 FCC 7776 at 7781, para. 14.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Bell Atlantic<br>Tariff F.C.C. No. 1 | Transmittal No. 535 |
| BellSouth<br>Tariff F.C.C. No. 1 | Transmittal No. 76 |
| Cincinnati Bell Telephone<br>Tariff F.C.C. No. 35 | Transmittal No. 614 |
| Nevada Bell<br>Tariff F.C.C. No. 1 | Transmittal No. 147 |
| Pacific Bell<br>Tariff F.C.C. No. 128 | Transmittal No. 1602 |
| Southern New England Telephone<br>Tariff F.C.C. No. 39 | Transmittal No. 549 |
| Southwestern Bell Telephone<br>Tariff F.C.C. No. 73 | Transmittal Nos. 2244 and 2254 |
| US West Communications<br>Tariff F.C.C. No. 1 | Transmittal No. 302 |

**ORDER**

**Adopted: January 29, 1993; Released: January 29, 1993**

By the Deputy Chief (Policy) Common Carrier Bureau:

## I. INTRODUCTION

1. As part of its plan to encourage the efficient use of transport facilities, the Commission adopted the *Transport Order* in September 1992.[1] Among other things, this order promulgated Section 69.126 of the Commission's Rules, 47 C.F.R. § 69.126, which requires local exchange carriers (LECs) to waive, until May 1, 1994, nonrecurring charges (NRCs) for service connection when interexchange carriers (IXCs) convert trunks from tandem-switched transport to direct-trunked transport or from direct-trunked transport to tandem switched transport, or when an IXC orders the disconnection of overprovisioned trunks.[2] The Commission also directed LECs to file tariffs waiving these charges no later than December 1, 1992.[3] Tariffs were duly filed by the above-captioned LECs in accordance with this order, and are currently scheduled to go into effect on February 1, 1993. Several IXCs, however, objected to conditions imposed by those LECs in their tariffs which qualified the terms under which NRCs would be waived under Section 69.126.[4]

## II. PLEADINGS

2. *Restrictions generally.* In general, the IXCs who filed petitions against these tariffs assert that the restrictions imposed by the LECs would circumvent or eviscerate the clear language and intent of Section 69.126 of the Commission's Rules.[5] In addition to arguing that the tariffs are patently unlawful on this basis, several IXCs contend that many of the LECs' revisions impose unjust and unreasonable conditions in violation of Section 201(b) of the Act, 47 U.S.C. § 201(b), because they discourage IXCs from making their access connections more efficient.[6] Many IXCs, in fact, take the position that any and all NRCs associated with network reconfigurations induced by the new transport rate structure should be waived.[7] IXCs also generally argue that several of the tariffs are vague and ambiguous in violation of Sections 61.2 and 61.54(j) of the Commission's Rules, 47 C.F.R §§ 61.2, 61.54(j).[8]

3. LECs, on the other hand, generally maintain that the IXCs are trying to use the "narrow" waiver requirement in the *Transport Order* to obtain waivers of NRCs when they expand their networks or where they propose to make less efficient use of network facilities by carrying the same traffic over more lines.[9] SNET complains that the IXCs are seeking to broaden the interpretation of the *Transport Order* to an extreme and characterizes the arguments as "self-

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[1] Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (*Transport Order*).

[2] *Transport Order*, 7 FCC Rcd at 7038.

[3] *Id.*

[4] Petitions were filed against most of the NRC waiver tariffs by Allnet Communication Services, Inc., (Allnet), MCI Telecommunications Corporation (MCI), and Sprint Communications Company Limited Partnership (Sprint). Telephone Express, Communigroup, Inc. and Vartec (Telephone Express/Communigroup/Vartec) filed against Southwestern Bell Transmittal No. 2244; Telephone Express/Vartec/Tel America/Express Tel filed against US West Transmittal No 302; and Vartec and Communigroup, Inc. (Vartec/Communigroup) filed against BellSouth Transmittal No. 76. Replies or oppositions were filed by the Bell Atlantic Telephone Companies (Bell Atlantic); BellSouth Telecommunications, Inc. (BellSouth); Cincinnati Bell Telephone (CBT); Pacific Bell and Nevada Bell (Pacific and Nevada); Southwestern Bell Telephone Company (SWB); Southern New England Telephone Company (SNET) and US West Communications (US West).

[5] *See e.g.*, Vartec/Communigroup Petition (BellSouth) at 6; Telephone Express/Vartec/Tel America/Express Tel Petition (US West) at 8-9.

[6] *See e.g.*, Allnet Petition at 1-2. *See also* Telephone Express/Communigroup/Vartec Petition (SWB) at 14; Telephone Express/Vartec/Tel America/Express Tel Petition (US West) at iii and 1-2.

[7] *See* Allnet Petition at 2-3, 9-10; MCI Petition at 6.

[8] *See* Sprint Petition at 2-3; Vartec and Communigroup Petition at 1-2.

[9] *See e.g.*, Bell Atlantic Reply at 1-2.

serving" and "irresponsible."[10] Bell Atlantic complains that the IXCs want an additional windfall at the expense of the LECs, while BellSouth similarly argues that the petitioners are merely trying to avoid the financial burden of their own decision making and instead shift the burden to the LECs.[11]

4. *One-to-one replacement.* The petitioners also challenge specific conditions which appear in many of the above-referenced tariffs filed by the LECs to implement the Section 69.126 waiver. First, various IXCs object to the requirement in some of the LEC tariffs that there be a one-to-one relationship between the number of trunks installed and the number disconnected. They argue that having to install one trunk for every trunk disconnected in order to qualify for waiver of the NRC is unjust and unreasonable in violation of Section 201(b) of the Act because there may need to be more direct trunks connected at the end office than trunks disconnected at the tandem.[12] By limiting the waiver to one-for-one conversions, Vartec/Communigroup argue, a LEC can unlawfully charge an IXC for maintaining equivalent capacity. Vartec/Communigroup Petition at 8, 10. Allnet maintains that this restriction will keep most IXCs from reconfiguring their networks as efficiently as possible, and would favor larger IXCs who, because of trunking efficiencies, have more of a "one-to-one" correspondence between the necessary number of tandem trunks and equivalent trunk counts for direct trunking for the same loading of traffic. Allnet Petition at 5.[13]

5. In reply, several LECs maintain that the one-to-one requirement is reasonable, arguing that an unlimited waiver of NRCs would give IXCs a "blank check" to order unlimited amounts of new switched access facilities while LECs would bear the cost.[14] In this regard, SNET believes the one-to-one condition is a reasonable policy to ensure that carriers' changes increase their network routing efficiency, but not the capacity of the carriers' existing facilities. SNET Reply at 3.

6. Pacific and Nevada assert that Pacific's tariff requires trunk rearrangement orders to identify on a one-to-one or "equivalent basis," those existing trunks to be rearranged. According to Pacific, "equivalent basis" means that the one-for-one limit will not apply where good engineering practice would replace one POP-to-tandem trunk with more than one POP-to-end office trunk.[15] Pacific states that Poisson and Erlang tables will be used to develop the maximum ratio of newly connected trunks to disconnected trunks that would be necessary to meet the design blocking criteria specified in Pacific Bell's tariff.[16] According to Pacific, this ratio should assure that no customer who follows standard engineering practices will incur NRCs when reconfiguring its current traffic from common transport to dedicated or vice versa, even if the ratio of newly connected trunks to disconnected trunks is substantially more than one-to-one.[17] Further, Pacific asserts, because under the current rate structure there has been little incentive for a carrier to order the most efficient number of trunks from the access tandem to its POP, the number of newly connected trunks should ordinarily be less than the number of disconnected trunks.[18]

7. *Unavailability of new facilities.* The petitioners also complain that some LEC tariffs do not address the possibility that a LEC may fail or be unable to provide facilities to accommodate an IXC's timely request for conversion. In this event, these IXCs argue, the Commission should require LECs to charge the same rates for the temporary facilities that they would charge if the requested facilities had been made available and installed in a timely manner.[19]

8. Bell Atlantic characterizes this contention as "outlandish" and beyond the scope of this limited proceeding.[20] SWB states that its tariff already states that it will meet the established ordering intervals, so a Commission-imposed time limit is unnecessary.[21] Some LECs argue that they cannot bill a rate for their services other than what is listed in their tariffs, or they will be in violation of Section 203 of the Act.[22] Both US West and BellSouth state that they will work with their customers to ensure that adequate facilities are available; BellSouth states that it does not anticipate that it will have difficulties in provisioning the interoffice portion of customers' service.[23]

9. *Timing of disconnects.* Another issue raised by the petitioners is the amount of time a LEC would permit an IXC to disconnect a tandem route after a direct route is connected, or vice versa, and whether the connect-disconnect should occur simultaneously. Allnet favors no time limit in this instance, arguing that carriers need time to assess whether the new trunking arrangements are adequate to handle the traffic volumes, but states that 90 days would permit IXCs to better coordinate and identify the

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[10] SNET Reply at 2.

[11] Bell Atlantic Petition at 2; BellSouth Petition at 14.

[12] *See* Allnet Petition at 5; Vartec/Communigroup Petition (BellSouth) at 8, 10; Telephone Express/Vartec/Tel America/Express Tel Petition (US West) at 7; Telephone Express/Communigroup/Vartec Petition (SWB) at 4. Several carriers maintain that direct-trunked transport requires more trunks than tandem-switched transport to accommodate the same level of traffic. With direct trunks, the overflow capacity of the tandem route is no longer available to the interexchange carrier, according to petitioners. Vartec/Communigroup Petition (BellSouth) at 8. Petitioners also state that smaller trunk groups carry less minutes of use (MOU) because they do not enjoy the economies of shared common trunks that serve multiple offices, with varying time of day peaks. *See e.g.*, Allnet Petition at 5; Vartec/Communigroup Petition (BellSouth) at 8-10; MCI Petition at 2, 5-6.

[13] *See also* Telephone Express/Communigroup/Vartec Petition (SWB) at 10.

[14] *See* SNET Reply at 3; Bell Atlantic Reply at 2-3; BellSouth Reply at 4; US West Reply at 5.

[15] Pacific and Nevada Reply at 2.

[16] *Id.*

[17] *Id.* at 2-3.

[18] *Id.* at 3; *see also* BellSouth Reply at 5.

[19] *See e.g.*, Vartec/Communigroup, Inc. Petition (BellSouth) at 12-13; Allnet Petition at 6. Additionally, Allnet and Vartec/Communigroup also request that the Commission require that LECs install sufficient facilities to accommodate both direct trunking and tandem switched trunking within 30 days of the requested due date by the IXC.

[20] Bell Atlantic Reply at 3.

[21] SWB Reply at 6, citing SWB Tr. 73 § 5.2.3, Service Provisioning Intervals.

[22] *See Id.* at 7; US West Reply at 7-8.

[23] *See* US West Reply at 7; BellSouth Reply at 10-11.

disconnection-connection of individual trunks.[24] Allnet also argues that to require that connect and disconnect orders be submitted at the same time, as US West, Bell Atlantic, and Southwestern Bell have required, violates Section 201(b) of the Act because the possibility exists that the service could be interrupted for a substantial amount of time.[25]

10. In its reply, US West states that it would modify its transmittal to extend the time limit on disconnecting tandem and direct routes from 30 to 90 days after the associated installation request is implemented.[26] Also, BellSouth indicates that it permits its customers to wait for 90 days following implementation of the associated connect order to submit the disconnect order.[27]

11. SWB and Bell Atlantic assert that at the time the order is placed, an IXC should know what facilities the IXC is replacing if it is truly a rearrangement, and not a new order.[28] Also, SWB and US West indicate that they would incur additional costs to monitor and reconcile connect and disconnect orders if the IXC is not required to submit them concurrently.[29] SWB further argues that there is no incentive for an IXC to disconnect tandem routed trunks because the charges are usage based. Thus, SWB contends, an IXC could effectively duplicate its network and tie up facilities that could be used to provide service for its competitors.[30]

12. *Changes in technical specifications.* Finally, several IXCs raise concerns about the availability of NRC waivers when an IXC requests changes in certain technical specifications. In general, LECs maintain that since NRCs associated with installing certain features recover the additional costs of those features, it would be unreasonable to require that these charges be waived since some IXCs would use the rearrangement waiver as an opportunity to enhance their network at the LEC's expense and to gain an improper advantage over their competition.[31] SWB proposes instead to waive the charges for features installed on the rerouted trunk if the customer already had the features on the trunk to be disconnected.[32]

13. The petitioners' complaints concerning various technical specifications fall within several categories. Some IXCs complain that when an IXC connects direct trunks of a voice grade equivalency that is different from that of the trunks disconnected at the tandem, various LECs eliminate the waiver of the NRC associated with that arrangement. Vartec/Communigroup argue that such restrictions will prevent most rearrangements from qualifying for the waiver of NRCs intended by Section 69.126 because while IXCs may use DS1s for tandem-switched transport, many IXCs will order DS0s or voice grade circuits for direct trunks.[33]

14. Further, Allnet complains that a requirement in some of the tariffs that IXCs maintain the same point of presence (POP) location is unjust and unreasonable under Section 201(b) of the Act because IXCs, in an effort to become more efficient, may need to consolidate their POPs to enhance network efficiency while rearranging trunks during the waiver period.[34]

15. Several LECs take issue with this contention.[35] US West, for example states that it is not unreasonable for it to require that the same customer premises or POP be maintained because the *Transport Order's* waiver of NRCs is aimed at service arrangements between: (1) end office and access tandems; (2) access tandems; and (3) serving wire centers and end offices, and serving wire centers. US West argues the waiver is not for NRCs associated with entrance facilities (*i.e.* between serving wire centers and POPs or POP relocation.)[36] BellSouth argues that the move by a customer of its POP locations and the associated trunks is an entirely different matter from the conversion of trunks from one routing arrangement to another.[37] BellSouth asserts that the change of POP locations is a matter independent of routing conversion; a customer could change from tandem-routed to direct routed trunks without being required to change POP locations. BellSouth further states that significantly greater expenses are involved when POP locations are changed.[38]

16. Allnet also requests that the tariffs be amended to state expressly that the Section 69.126 waiver applies to rearrangements to all feature group types -- A, B, C and D.[39] However, several LECs maintain that the waiver does not apply to Feature Group A. SWB, for example states that new Section 69.126 specifically uses the term "trunks" and thus covers only trunk disconnection/connection and "disconnection of overprovisioned trunks." Since Feature Group A is a line side provisioned service for which the access customer does not have a choice between tandem-routed and direct-routed provisioning, SWB reasons, reconfiguration is not applicable to FGA because it is not a trunk side provisioned service.[40]

17. Sprint argues that some of the tariffs are unreasonably vague in violation of Sections 61.2 and 61.54(j) of the Commission's rules because they do not specifically state that access order charges, design change charges and other

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[24] Allnet Petition at 7. *See also* Telephone Express/Vartec/Tel America/Express Tel Petition (US West) at 11-12; Telephone Express/Communigroup/Vartec Petition (SWB) at 11-12.

[25] *Id.* at 8. *See also* Telephone Express/Communigroup/Vartec Petition (SWB) at 12; Telephone Express/Vartec/Tel America/Express Tel Petition (US West) at 12-13.

[26] US West Reply at 5.

[27] BellSouth Reply at 10. *Compare* Telephone Express/Communigroup/Vartec Petition (SWB) at 9-10; Telephone Express/Vartec/Tel America/Express Tel Petition (US West) at 17-18.

[28] SWB Reply at 8; Bell Atlantic Reply at 3.

[29] SWB Reply at 8; US West Reply at 6-7.

[30] SWB Reply at 8.

[31] *See e.g.*, SWB Reply at 5.

[32] *Id.* at 5-6.

[33] Vartec/Communigroup Petition (BellSouth) at 13-14; Telephone Express/Communigroup/Vartec Petition (SWB) at iv, 8, 15; Telephone Express/Vartec/Tel America/Express Tel Petition (US West) at 13.

[34] Allnet Petition at 9.

[35] *See e.g.*, SNET Reply at 3-4; BellSouth Reply at 7-8; US West Reply at 8-9.

[36] US West Reply at 8-9.

[37] BellSouth Reply at 7.

[38] *Id.* at 7-8.

[39] Allnet Petition at 9-10. *See also* Telephone Express/Vartec/Tel America/ Express Tel Petition (US West) at 15; Telephone Express/Communigruop/Vartec Petition (SWB) at 13-14.

[40] SWB Reply at 9. *See also;* BellSouth Reply at 11-12; US West Reply at 9.

administrative or engineering NRCs will be waived.[41] In reply, several LECs state that these charges are, in fact, waived.[42]

18. Telephone Express/Vartec/Tel America/Express Tel object to eliminating the waiver for direct-trunked transport that has a different service type of interface than tandem switched transport, arguing that this restriction would prevent most rearrangements from qualifying for the waiver of NRCs intended by Section 69.126 of the Commission's Rules.[43] US West replies that its tariff does not allow for waiver of NRCs when the Interface Group Category is changed, as claimed by Telephone Express because the *Transport Order* only applies to interoffice network reconfigurations, and Interface Group categories only apply to entrance facilities.[44]

19. Finally, some IXCs argue that Section 69.126 requires waiver of termination charges such as termination liabilities on special construction services. According to SWB, however, the termination charge for special construction is not service related and generally does not pertain to the interoffice trunks which customers will be rearranging. Rather, SWB asserts, special construction termination liability is the nonrecoverable cost associated with specially constructed facilities. SWB maintains that a LEC should not be left with unrecovered costs and that therefore a NRC waiver should not be permitted.[45]

## III. DISCUSSION AND ORDERING CLAUSES

20. The Common Carrier Bureau has reviewed the above-captioned Transmittals, as modified, and the related pleadings. In light of the various modifications made by the LECs to the above-captioned tariffs,[46] and the pleadings filed with respect to these transmittals we conclude that no compelling argument has been presented either that the tariffs are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

21. Accordingly, IT IS ORDERED that the petitions to reject, or alternatively, suspend and investigate Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 535; BellSouth Tariff F.C.C. No. 1, Transmittal No. 76; Cincinnati Bell Telephone Tariff F.C.C. No. 35, Transmittal No. 614; Nevada Bell Tariff F.C.C. No. 1, Transmittal No. 147; Pacific Bell, Tariff F.C.C. No. 128, Transmittal No. 1602; Southern New England Telephone Tariff F.C.C. No 39, Transmittal No. 549 and US West Communications Tariff F.C.C. No. 1, Transmittal No. 302, filed by Allnet Communication Services, Inc., MCI Telecommunications Corporation; and Sprint Communications Company Limited Partnership ARE DENIED.

22. IT IS FURTHER ORDERED that, the petition to reject, or alternatively, suspend and investigate Southwestern Bell Transmittal No. 2244 filed by Telephone Express, Communigroup, Inc., and Vartec IS DENIED.

23. IT IS FURTHER ORDERED that, the petition to reject, or alternatively, suspend and investigate US West Transmittal No. 302 filed by Telephone Express, Vartec, Tel America and Express Tel IS DENIED.

24. IT IS FURTHER ORDERED that, the petition to reject, or alternatively, suspend and investigate BellSouth Transmittal No. 76, filed by Vartec and Communigroup, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

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[41] Sprint Petition at 2. *See also* Telephone Express/Vartec/Tel America/Express Tel Petition (US West) at 14-16. According to Sprint, these tariffs state that the NRC for service rearrangements and local transport installations will be waived for IXCs reconfiguring their networks in response to the *Local Transport Order*. Id. at 2.

[42] CBT Reply at 1-2; Pacific Reply at 3; SNET Reply at 6; US West Reply at 10.

[43] Telephone Express/Vartec/Tel America/Express Tel Petition (US West) at 6.

[44] *Id.* at 11.

[45] SWB Reply at 9-10. *See also* SNET Reply at 4 and BellSouth Reply at 13-14.

[46] *See e.g.*, SWB Transmittal No. 2254 filed January 27, 1993.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T Communications Transmittal No. 4737
Tariff F.C.C. Nos. 2 and 11

**ORDER**

**Adopted: February 1, 1993; Released: February 1, 1993**

By the Chief, Tariff Division, Common Carrier Bureau:

1. On January 19, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective February 2, 1993, on 14 days' notice pursuant to special permission granted by the Common Carrier Bureau.[1] This filing introduces a Customer Specific Term Plan (CSTP) II 800 promotion for customers who order new Megacom 800, Readyline 800, or 800 Gold service for use with new or existing CSTP II 800 service.

2. On January 26, 1993, MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal No. 4737. AT&T replied on January 29, 1993.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4737 and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. Nos. 2 and 11, Transmittal No. 4737, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Application No. 1519 for Special Permission, filed January 14, 1993; Special Permission No. 93-66, granted January 19, 1993.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 1, 1993**

**PAPERWORK REDUCTION ACT NOTICE**

**CC Docket No. 86-10**

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980, 44 U.S.C. 3507. Persons wishing to comment on this information collection should contact Jonas Neihardt, Office of Management and Budget, Room 3235 NEOB, Washington, DC 20503, telephone (202) 395-4814. For further information contact Judy Boley, Federal Communications Commission, telephone (202) 632-7513.

Please note: The Commission has requested emergency review of this item by **February 22, 1993** under the provisions of 5 CFR 1320.18.

Title: Provision of Access for 800 Service

Action: New Collection

Respondents: Businesses or other for-profit

Frequency of Response: One-time collection

Estimated Annual Burden: 57 responses; 60.7 hours average burden

Needs and Uses: Local telephone companies are required to file tariffs to provide 800 data base access services. Tariffs must be filed by carriers so that both the Commission and the public can evaluate whether the prices that carriers seek to charge for the services are reasonable and are not unreasonably discriminatory.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 1, 1993**

**EXPANDED INTERCONNECTION FILING DATES ESTABLISHED FOR RESPONSES TO IDAHO PUBLIC UTILITIES COMMISSION'S REQUEST FOR LIMITED WAIVER OF FEBRUARY 16, 1993 DEADLINE FOR FILING PHYSICAL COLLOCATION TARIFFS**

**CC Docket No. 91-141**

On October 19, 1992, the Federal Communications Commission (Commission) released a Report and Order and Notice of Proposed Rulemaking in *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 (FCC 92-440), 7 FCC Rcd 7369 (1992) (Order). The Idaho Public Utilities Commission (Idaho) has filed a request for limited waiver of the Commission's requirement that Tier 1 local exchange carriers (LECs) file physical collocation tariffs by February 16, 1993. Idaho requests that US West Communications and GTE Northwest (GTE) not be required to file physical collocation tariffs by the February deadline. In support of its request, Idaho states that on January 26, 1993, in response to a petition filed by GTE, Idaho initiated a proceeding regarding interconnection for intrastate special access, which it expects to complete by March 26, 1993.

Comments on the Idaho waiver request must be filed by Friday, **February 5, 1993** and replies by Wednesday, **February 10, 1993** with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Parties should send copies of comments and replies to Linda L. Haller, Policy and Program Planning Division, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554 and to the Commission's new copy contractor: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 (202-857-3800). Parties may obtain a copy of the Idaho waiver request from ITS.

This remains a non-restricted rulemaking proceeding for purposes of the Commission's *ex parte* rules. *Ex parte* presentations are permitted, except during any Sunshine Agenda period, provided they are disclosed as described in the Commission's rules. *See* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206. For further information, contact Linda L. Haller (202-632-1298), Policy and Program Planning Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 92-77**

In the Matter of

Billed Party Preference
For 0+ InterLATA Calls

**ORDER**

**Adopted: July 31, 1992; Released: July 31, 1992**

**Reply date: August 27, 1992**

By the Chief, Common Carrier Bureau:

1. On June 10, 1992, the Commission released a Notice of Proposed Rule Making (*Notice)* to consider the merits of an automated "billed party preference" routing methodology for 0+ interLATA pay phone traffic and for other types of operator-assisted interLATA traffic. The Commission sought comment on the the billed party preference proposal by July 7, 1992, and reply comments by August 6, 1992. Pursuant to the *Notice* parties filed comments as scheduled, on July 7, 1992. On July 23, 1992, American Public Communications Council (APCC), on behalf of itself and fourteen other parties, filed a motion seeking a 21-day extension of the deadline for filing of reply comments.

2. APCC claims that this extension is necessary both because of the extensive volume of the record and the complexity of the issues presented by the *Notice.* APCC points out that more than fifty-five parties filed comments totalling more than nine hundred pages. APCC states that these comments address twelve highly technical questions identified in the *Notice,* issues which overlap and have been argued from many different perspectives. In particular, APCC asserts that parties' cost estimates for implementation of billed party preference require careful review. APCC claims that an extension would permit the parties to conduct a more complete analysis, and would thereby benefit the public by providing the Commission with a more comprehensive record. No party opposed APCC's request.

3. Although it is the policy of the Commission that extensions of time shall not be routinely granted, we believe, in light of the extensiveness of the record in this proceeding and the complexity and importance of the issues presented, that the public interest would be served by allowing parties the additional time requested by APCC in which to prepare reply comments. We therefore grant APCC's motion. This extension will give all parties ample time to prepare reply comments, and we do not anticipate any further extensions.

4. Accordingly, IT IS ORDERED, pursuant to sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154 (j) and 155 (c), and authority delegated therunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91 and 0.291, that the motion of APCC for extension of time is GRANTED. The deadline for filing reply comments is extended to August 27, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released:** January 28, 1993

**CC Docket No. 92-166**

**MSS Above 1 GHz Negotiated Rulemaking Committee**

**Agency**: Federal Communications Commission

**Action**: Notice of public meetings.

**Summary**: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons of the fifth and sixth meetings of the MSS Above 1 GHz Negotiated Rulemaking Committee ("Committee").

**Dates**: *Meeting No. 5:* Thursday, February 18, 1993 at 9:30 a.m.

*Meeting No. 4:* Wednesday, February 25, 1993 at 9:30 a.m.

**Addresses**: Both meetings will be held at the Federal Communications Commission, Rm. 856, 1919 M Street, N.W., Washington, D.C. 20554.

**For additional information contact**: Kathleen Campbell, Administrative Assistant to the Committee, at (202) 634-1952.

**Supplementary Information**: The agenda for both meetings of the MSS Above 1 GHz Negotiated Rulemaking Committee is as follows:

1. Opening Remarks/Comments
2. Adoption of Agenda
3. Minutes/Records of Previous Meeting
4. Introduction of Documents
5. Informal Working Group Report - Issues
6. Acceptance/Approval of Recommended Rules
7. Acceptance/Approval of Report Text
8. Agenda for future meetings
   - Schedule for future meetings
9. Other Business

Members of the general public may attend this meeting. The Federal Communications Commission will attempt to accommodate as many people as possible. However, admittance will be limited to the seating available. There will be no public oral participation, but the public may submit written comments to Fern J. Jarmulnek, the Committee's Designated Federal Officer, before the meeting.

Subsequent Committee meetings are currently scheduled for Thursday, March 4; Tuesday, March 9; Thursday, March 18; Thursday, March 25; and Friday, April 2. All subsequent Committee meetings noted in this paragraph are scheduled to begin at 9:30 A.M. at the Federal Communications Commission, 1919 M Street, N.W., Room 856, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: January 29, 1993**

## CLARIFICATION OF MELLON BANK STAMP AND RECEIPT PROCEDURES FOR FEEABLE APPLICATION

The Federal Communications Commission is taking this opportunity to clarify its Mellon Bank stamping procedures and how receipted copies are obtained.

Applicants wishing a stamped receipt copy of any filing must provide an additional copy (to be stamped and returned) with each filing submitted. Each application package must be assembled with the requested stamped receipt copy on top, followed by the remittance, the original application with FCC Form 155 (if required) on top, then any other supporting documentation.

Applications that are mailed or otherwise shipped must contain a self-addressed stamped envelope of sufficient size to accommodate the stamped receipt copy to be returned. If the envelope is not of sufficient size, the requested stamped receipt copy will *not* be returned to the applicant. The receipt copy of the submission and the self-addressed stamped envelope must be placed inside the mailing envelope, but on top of the original application.

When hand delivering an application, the receipt copy must be attached to the outside of the envelope containing the original application. The copy will be stamped and immediately returned when presented to the acceptance clerk at Mellon Bank.

Only those receipt copies which conform to the above filing procedures will be stamped and receipted. Any submission of receipt copies apart from the original application or any receipt copies submitted in any other packaging order will not be receipted. This policy will not prevent the original application from being processed in accordance with established procedures.

Questions concerning this Public Notice should be addressed to Regina Dorsey, Chief, Billings and Collections Branch, at 202-632-0241.

**NOTICE**

A copy of this Public Notice shall be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re

Revised Fees Established
Pursuant to the
Telecommunications
Authorization Act of
1992.

**ORDER**

**Adopted: January 29, 1993; Released: February 2, 1993**

By the Commission:

1. By this action, we are amending our Schedule of Charges, 47 C.F.R. § 1.1102 *et seq.*, to establish a separate section governing fees for the processing of applications related to Low-Earth Orbit Satellite Systems and to modify the fee for the inspection of vessels under the Great Lakes Agreement. These changes codify amendments to the fee schedule contained in the Telecommunications Authorization Act of 1992. *See* 47 U.S.C. §§ 158(g)(3)(c), (g)(22), as amended Pub. L. No. 102-538, enacted October 27, 1992. The revised charges are set forth in the Appendix.

2. Because the amendments adopted herein are a matter of agency organization, procedure or practice and simply codify statutory changes, the notice and comment and effective date provisions of the Administrative Procedure Act are not applicable. 5 U.S.C. §§ 553(b)(A),(B),(d).

3. Accordingly, IT IS ORDERED, that the Schedule of Charges, 47 C.F.R. § 1.1102 *et seq.*, IS AMENDED as set forth in the Appendix, attached hereto, effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX

Part 1 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. § 552, unless otherwise noted.

2. Section 1.1103 is amended to read as follows:

Section 1.1103 Schedule of Charges for equipment authorization, experimental radio services, international telecommunications settlements, radio operator examinations, and ship inspections.

* * * * *

| | | | | |
|---|---|---|---|---|
| 16. Great Lakes Agreement | | | | |
| a. Inspection..... | FCC 801<br>FCC 155 | 75.00 | FDS | Federal Communications Commission<br>P.O. Box 358110<br>Pittsburgh, PA<br>15251-5110 |

* * * * *

3. Section 1.1105 is amended to read as follows:

Section 1.1105 Schedule of Charges for common carrier services.

* * * * *

| | | | | |
|---|---|---|---|---|
| 22. Low-Earth Orbit Satellite Systems | | | | |
| a. Application for Authority to Construct (per system of techologically identical satellites)..... | Written Request & FCC 155 | 6,000.00 | CZW | Federal Communications Commission Common Carrier Dom. Earth Stations P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| b. Application for Authority to Launch and Operate (per system of technologically identical satellites)..... | Written Request & FCC 155 | 210,000.00 | CLW | Federal Communications Commission Common Carrier Dom. Earth Stations P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| c. Assignment or Transfer (per request) ..... | Written Request & FCC 155 | 6,000.00 | CZW | Federal Communications Commission Common Carrier Dom. Earth Stations P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| d. Modification (per request) ..... | Written Request & FCC 155 | 15,000.00 | CQW | Federal Communications Commission Common Carrier Dom. Earth Stations P.O. Box 358160 Pittsburgh, PA 15251-5160 |

| | | | | |
|---|---|---|---|---|
| e. Special Temporary Authority or Waiver of Prior Construction Authorization (per request)..... | Written Request & FCC 155 | 1,500.00 | CXW | Federal Communications Commission Common Carrier Dom. Earth Stations P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| f. Amendment of Application (per request)..... | Written Request & FCC 155 | 3,000.00 | CAW | Federal Communications Commission Common Carrier Dom. Earth Stations P.O. Box 358160 Pittsburgh, PA 15251-5160 |
| g. Extension of Construction Permit/Launch Authorization (per request)..... | Written Request & FCC 155 | 1,500.00 | CXW | Federal Communications Commission Common Carrier Dom. Earth Stations P.O. Box 358160 Pittsburgh, PA 15251-5160 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 86-10**

In the Matter of

Provision of Access
for 800 Service

**SECOND REPORT AND ORDER**

**Adopted: January 29, 1993; Released: January 29, 1993**

By the Commission: Commissioner Duggan issuing a separate statement.

## I. INTRODUCTION

1. This Report and Order adopts rate structure and pricing rules for 800 data base access services. It concludes that: 1) local exchange companies (LECs) must price basic 800 data base service on a per query basis; 2) the rate structures that LECs employ for optional "vertical" features must reasonably reflect the nature of their underlying costs; 3) LECs subject to price cap regulation must treat the basic 800 data base service package of features as a restructured service while treating vertical features as new services, although the costs of the basic service may be treated as exogenous costs; and 4) LECs subject to price cap regulation must also place all 800 data base service subelements in a new, separate "data base" service category within the traffic sensitive switched access basket under price caps, and employ a sub-index for vertical features, both with five percent upper and lower bands.

## II. BACKGROUND

2. 800 service is an interexchange service in which subscribers agree in advance to pay for calls made to their 800 number from a specified area. LECs must handle originating 800 access differently from originating access for ordinary interexchange calls because the LECs must route 800 calls to the carrier selected by the 800 service subscriber (the called party), rather than the carrier presubscribed to the originating line or chosen by the calling party.

3. LECs currently provide originating 800 service through the so-called "NXX" screening methodology. Under this system, LECs identify the interexchange carrier (IXC) that should carry the call based on the three-digit "NXX" code immediately following the 800 prefix of the called number. Consequently, 800 numbers are not "portable" under this NXX system, that is, an 800 service subscriber cannot switch carriers without changing its 800 number.

4. The Bell Operating Companies (BOCs) and independent telephone companies will replace the current NXX system with a new "data base system" of 800 access. Under the data base system, the carriers selected by 800 service customers will be stored in data bases, and LECs will identify the appropriate carrier for each 800 number call by querying a data base via their common channel signaling system (SS7) network. Because the data base system permits LECs to use the entire 800 number, rather than just the NXX digits, to identify the 800 carrier, this system provides for 800 number portability.

5. In addition to permitting 800 number portability, the data base system can be used to provide various "vertical" features. These include: (1) call validation (ensuring that calls originate from subscribed service areas); (2) POTS translation of 800 numbers[1] (which is generally necessary for the routing of 800 calls); (3) alternate POTS translation (which allows subscribers to vary the routing of 800 calls based on factors such as time of day, place of origination of the call, etc.); and (4) multiple carrier routing (which allows subscribers to route to different carriers based on similar factors).

6. In 1989, the Commission adopted the *800 Data Base Order* permitting LECs to replace NXX access with the 800 data base system when they had collectively achieved a specified level of SS7 deployment.[2] In 1991, in the *800 Data Base Reconsideration Order*, we affirmed our previous decision that core SS7 costs should be borne by all network users[3] and concluded that LECs should offer 800 data base access through separate subelements for carrier identification and the various vertical features.[4] We required unbundling so that only those customers who actually use each service -- those who generate the costs -- pay for it.[5] In conjunction with that order, we also issued a Second Sup-

[1] The POTS translation service converts the 800 number into a designated Plain Old Telephone Service 10-digit number.

[2] Provision of Access for 800 Service, CC Docket No. 86-10, Report and Order, 4 FCC Rcd 2824 (1989) (*800 Data Base Order*), *recon.*, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*800 Data Base Reconsideration Order*).

[3] We stated that the only SS7 costs that may be recovered directly from 800 data base customers are those SS7 costs incurred specifically for the implementation and operation of the 800 data base system. We found that the remaining costs represent a general network upgrade because SS7 is a new network infrastructure that will increase the efficiency with which LECs provide existing services. *800 Data Base Reconsideration Order*, at 5428-29.

[4] Provision of Access for 800 Service, CC Docket No. 86-10, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421, 5431, para. 59 (*Notice*).

[5] Although we have already required LECs to unbundle basic 800 data base service from ordinary access and reaffirmed that decision on reconsideration, Ad Hoc challenges that decision in its comments. Ad Hoc Comments at 3-10. Ad Hoc's comments are, in essence, a late-filed petition for reconsideration of decisions made in previous orders. Accordingly, we dismiss Ad Hoc's challenge on this point for failure to comply with the 30-day statutory filing requirement governing petitions for reconsideration. 47 U.S.C. §405. *See Virgin Islands Telephone Corp.*, 7 FCC Rcd 4238 (1992).

plemental Notice of Proposed Rulemaking ("Notice").[6] In the *Notice*, we asked for comments on the appropriate rate structure and pricing rules for 800 data base access services, including both basic and vertical 800 data base services. We also asked for comments on how the new rate subelements should be treated under the price cap rules.[7] We address these issues below.

## III. PRICING STRUCTURE

### A. Unbundling Vertical 800 Data Base Features

7. *Background.* In the *800 Data Base Reconsideration Order*, we rejected requests by Bell Atlantic and PacTel that they be permitted to bundle specific vertical features with basic 800 data base service.[8] We found that neither BOC had made a sufficiently specific case to show that the 800 data base subelements lacked significant discrete costs. We stated that we would require full unbundling of vertical features unless a LEC could show that the costs of providing particular vertical features were inconsequential.[9]

8. *Pleadings.* AT&T and Sprint support the current policy -- that all 800 data base vertical features be unbundled -- although Sprint specifically states that it would not require a service to be unbundled if providing the service did not impose any additional costs or if the costs of unbundling outweighed any possible benefit.[10] On the other hand, Pacific and SW Bell, with support from GTE, assert that call validation and POTS translation should be bundled with basic 800 data base service so as to foster competition among IXCs providing 800 service.[11] CompTel states that the cost of POTS translation and call validation are negligible, while MCI claims that LECs have not provided sufficient cost data for those services to permit a determination as to whether they should be bundled.[12] GTE and WilTel state that they would find bundling acceptable if allunbundled elements were also available separately.[13]

9. *Decision.* No LEC has made a convincing specific showing that the costs of providing any particular vertical feature is inconsequential. Therefore, there is no basis in the record at this time for allowing LECs to bundle one or more vertical features with basic 800 data base service.[14]

### B. Rate Structure for Unbundled 800 Data Base Services

#### 1. Basic 800 Data Base Service

10. *Pleadings.* In the *Notice*, we proposed that basic 800 data base service should be priced on a per query basis, and almost all commenters agree with the proposal. They assert that a per query charge would best reflect the manner in which 800 data base costs are incurred.[15] On the other hand, Ad Hoc, in keeping with its position that there should be no separate charge for basic 800 data base service, asserts that some, if not all, costs of 800 data base service should be recovered from vertical features.[16] Two BOCs challenge Ad Hoc's position, arguing that small carriers dependent on LEC-provided vertical features would be forced to subsidize the cost of basic 800 data base service, while larger carriers that provided their own vertical features would not contribute to the subsidy, but would benefit from the lower subsidized rates for basic 800 data base service.[17]

11. AT&T, MCI and United argue that a query charge should apply only when the call associated with the query is actually delivered to the IXC. Ameritech and Pacific, on the other hand, argue that the charge should apply whenever a LEC queries its data base, even if it does not deliver the call to the IXC.[18]

12. With respect to volume discounts, GTE, Sprint, and USTA support giving the LECs the option to grant volume discounts for 800 data base service when discounts can be cost justified.[19] IXCs other than AT&T complain, however, that 1) LECs, as monopolists, do not need the pricing flexibility to grant discounts, 2) such discounts would favor AT&T, and 3) discounts would not be cost justified.[20] GTE

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[6] *Notice*, at 5431.

[7] Parties filing comments and reply comments are listed in Appendix B. We use the abbreviations indicated in that appendix throughout this order.

[8] *800 Data Base Reconsideration Order*, at 5430.

[9] Id.

[10] AT&T Comments at 4-5, Reply at 2 n.**; Sprint Reply at 6-8.

[11] Pacific Comments at 7-8 (call validation and POTS translation should be bundled with basic); SW Bell Comments at 1-5 (POTS or 800 turnabout and call validation should be bundled with basic). GTE Reply at 5 (supports SW Bell). Ad Hoc also agrees that vertical features integral to the provision of basic service need not be unbundled. Ad Hoc Comments at 10-11.

[12] CompTel Comments at 8; MCI Reply at 18-19.

[13] GTE Comments at 2-5; WilTel Reply at 5.

[14] We note that pending before the Common Carrier Bureau is a Petition for Expedited Declaratory Ruling, filed by CompTel, June 19, 1992, asking that one version of Area of Service Routing -- routing to different IXCs based on the local access transport area (LATA) in which the call originates -- be treated as a feature of basic 800 data base service. Our decision here with respect to the bundling of *vertical* features would not, of course, apply to that version of Area of Service Routing if the Bureau or the Commission determines that the feature is properly considered a part of basic 800 data base service.

[15] Allnet Reply at 4; Ameritech Comments at 1, 11; BellSouth Comments at 1; AT&T Comments at 3; CompTel Comments at 3; GTE Comments at 5; MCI Reply at 16; NYNEX Comments at 4; Pacific Comments at 2; Rochester Comments at 10; Sprint Comments at 1; SW Bell Comments at 5; United Comments at 1; USTA Reply at 5-6 (but abberations may be justified); US West Comments at 4; WilTel Reply at 3. Still, NTCA suggests that a signaling transport or monthly charge may be desirable. NTCA Comments at 2.

[16] Ad Hoc Comments at 8.

[17] Pacific Reply at 6; SW Bell Reply at 2. Cf. BellSouth Reply at 3-4.

[18] MCI Comments at 4; United Reply at 3-4. SW Bell also appears to support MCI and United. SW Bell Reply at 1-2. Ameritech Reply at 8; Pacific Reply at 1-2. AT&T Comments at 3 n.*. AT&T proposes to define a query as "a completed call, request, or inquiry made to a data base to obtain information about a customer, call routing, line status, etc. and delivered to the IXC." Id. While OPASTCO states that some of the equipment that its members now use can only track completed basic 800 data base queries, OPASTCO Comments at 6-7, no one has proposed that a charge be assessed for incomplete queries.

[19] GTE Comments at 6 (while GTE expresses support for discounts that could be cost justified, it argues that, as an empirical matter, such discounts should not be permitted because they are not justified by actual cost reductions in this area); Sprint Comments at 2; USTA Reply at 6.

[20] Allnet Reply at 4; CompTel Comments at 3-4; MCI Reply at 17; Sprint Comments at 2; WilTel Reply at 4.

responds by noting that it needs to be able to offer cost justified discounts to compete with rival unregulated data base providers.[21]

13. *Decision*. The record provides almost unanimous support for our tentative conclusion that basic 800 data base access should be priced on a per query basis.[22] We now affirm that tentative conclusion. We adopt a per query charge for 800 data base because the data base query is a distinct part of the set up of an 800 call. Therefore, a per query charge best reflects the costs of providing 800 data base service.[23]

14. We also hold that LECs may charge IXCs for completed queries even if the LEC never actually delivers the associated call to the IXC. We conclude that if a LEC incurs the cost of a completed 800 data base query on behalf of an IXC customer, that as a matter of economic efficiency, the associated IXC should be responsible for covering those costs. Finally, we defer consideration of volume discounts to the tariff review process. We clarify, however, that carriers seeking such discounts will have to demonstrate that the discounts are cost justified and in the public interest.

### 2. Ancillary Basic 800 Data Base Service Issues

15. MCI states that the costs associated with the submission of 800 data base service orders through the Service Management System (SMS) should be recovered solely through a non-recurring charge (NRC) and that the charge be set at one level nationwide, since the SMS is to be managed by a single national third party LEC contractor.[24] LECs disagree with this position, asserting that SMS costs are not simply a single set of fixed costs, but that there are a continuing set of costs that will vary depending on usage, modifications to the system, and upgrades.[25]

16. The Common Carrier Bureau is currently considering a petition filed by CompTel seeking a ruling that SMS access is a Title II service subject to tariffing requirements.[26] Pending disposition of that petition, it would be premature to consider rate structure requirements for SMS services. If the Bureau or Commission concludes that SMS access is not a Title II service, then charges for SMS access will be subject to private contractual arrangements. Even if the Bureau or Commission decides that SMS access should be tariffed, we cannot establish a rate structure here because the record in this proceeding is inadequate. Hence, if tariffs are required, the proper rate structure will be determined at a later date. In that event, we will require that rates reflect the underlying costs of SMS service.

17. Some smaller LECs argue that small LECs should be granted greater pricing flexibility with respect to basic 800 data base service because of the fundamentally different nature of their markets.[27] Sprint responds, however, that permitting too much non-uniformity of rate structures will turn Part 69 into a morass.[28] We are certainly sympathetic to the special needs of smaller LECs, but we decline to grant them blanket pricing flexibility in the absence of any specific compelling reason why the rules and policies we adopt today would be likely to cause them undue hardship. In the absence of readily apparent unreasonable consequences, we want to encourage uniform rate structures.

### 3. Vertical Features

18. *Pleadings*. Commenting on the pricing structure of unbundled vertical features, GTE and three BOCs generally support a price that combines 1) an NRC reflecting the costs of establishing the services and 2) a monthly, rather than a per call, charge, reflecting the more variable costs of the services, unless it is economically practical to measure actual usage of the vertical feature. Pacific requests that LECs be granted full discretion to price in any reasonable manner. BellSouth asserts that it plans to offer POTS translation, areas of service validation, and multiple carrier selection without a recurring charge, claiming that the former does not generate any marginal recurring costs, and that it plans to treat the latter two the same way. US West, on the other hand, proposes to offer POTS translation on a per query basis.[29]

19. *Decision*. We find that it is not necessary to establish specific rate structure rules for individual vertical features. Instead, consistent with our *Part 69/ONA Order*,[30] we will only require that LECs employ vertical feature rate structures that reasonably reflect the nature of the underlying costs. We believe that this policy will produce considerable uniformity in 800 data base vertical feature rate structures among the LECs. If this result does not occur, and if a lack of uniformity creates difficulties for customers or in the tariff process, we will revisit this issue at a later date.

## IV. PRICE CAP ISSUES: INITIAL PRICES & EXOGENOUS COSTS

### A. Basic 800 Data Base Service: New or Restructured?

20. *Proposal/Pleadings*. After observing that basic 800 data base service would be replacing the current 800 NXX service, rather than supplementing it, the *Notice* character-

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[21] GTE states that it fears competition from Independent Telecommunications Network (ITN) and U.S. Intelco Networks. GTE Reply at 2-3.

[22] Only Ad Hoc opposes this result, based on its position that there be no separate charge for basic 800 database service, which we have already rejected.

[23] We note that 800 data base service is the first of a host of intelligent network services. In ordering the LECs to establish a per query rate structure for 800 data base service, we do not prejudge how rates for other intelligent network services should be structured.

[24] MCI Comments at 5-6. MCI also states that a nationwide allocator, based on average-dial-equipment-minutes should be used to assign costs to the interstate jurisdication. Id.

[25] Ameritech Reply at 8; BellSouth Reply at 3; Pacific Reply at 3; United Reply at 2-3.

[26] Petition for Expedited Declaratory Ruling, filed by CompTel, June 19, 1992.

[27] Centel Comments at 6-8; OPATSCO Comments at 5-6; Rochester Reply at 6-7; USTA Reply at 6-8.

[28] Sprint Reply at 4.

[29] BellSouth Comments at 2-3; GTE Reply at 5; NYNEX Comments at 4-5; Pacific Reply at 6; SW Bell Comments at 6; US West Comments at 5-6 (because it is practical to price POTS translation on a per-query basis, and thus this should be done).

[30] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Dockets 89-79 and 87-313, 6 FCC Rcd 4524, 4533, para. 50 (1991) (*Part 69/ONA Order*).

ized basic 800 data base service as a restructured service.[31] AT&T and MCI support this tentative conclusion and the reasoning underlying it.[32] Ad Hoc and NDC also offer supportive arguments in their latest comments.[33] Ad Hoc now states that the price levels and productivity factor employed under price caps were designed to generate the funds to finance investments in new service improvements such as basic 800 data base service, and that such funding is more than sufficient to cover the cost of this service. Therefore, Ad Hoc asserts, there is no need to permit LECs to recover the investment in this improvement by treating the service as new or the investment in the service as an exogenous cost. NDC, meanwhile, argues that basic 800 data base service fits the definition of a restructured service, because it is merely a modified method of "'provisioning a service that does not result in a net increase of service options available to customers.'" NDC also states that basic 800 data base service is a further implementation of equal access and therefore, its costs should be considered endogenous, not exogenous.[34]

21. LECs, on the other hand, argue that basic 800 data base service should be treated as a new service under price caps. They assert that it represents a new feature or option insofar as it permits number portability and is provided via new facilities. They claim that it fails to meet the price cap definition of a restructured service because it is much more than a mere "rearrangement of existing services" or new way of provisioning an existing service.[35]

22. Most LECs express concern that treating the basic 800 data base service as a restructured service will prevent LECs from recovering the additional costs imposed by this service. In particular, Ameritech challenges Ad Hoc's interpretation of price caps as effectively denying the existence of "new" services altogether and thereby preventing LECs from recovering the additional cost of providing such services.[36] Many LECs argue that, in the event 800 data base access is deemed a restructured service, the costs associated with it should be treated as exogenous costs.[37] Some state that if new improved services, such as this one, are not treated as new services under price caps, there will be little incentive for LECs to develop them in the future.[38] MCI replies that LECs have not documented any such costs, and that the new facilities installed will increase LEC efficiency and generate cost savings. It concludes that there is no reason that new facility costs need to be recovered via the new services test or otherwise.[39]

23. SW Bell asserts that the only reason that basic 800 data base service is not obviously a new service is that it will replace the existing NXX 800 service, and this is only because the FCC has mandated its replacement.[40] NDC indicates that it intends to petition the FCC to require LECs to retain a limited NXX option.[41] On the other hand, AT&T and MCI assert that, because NXX service will, in fact, no longer be available, basic 800 data base service is more appropriately treated as a replacement, restructured service.[42]

24. IXCs and customers argue further that the Commission should apply both the new and restructured pricing rules to 800 data base services for the same reason that it applied them to the initial set of unbundled ONA services in the *Part 69/ONA Order*. These parties also express concern that LECs will allocate an excessive portion of core SS7 costs to 800 data base services, and so claim that there is a need for a detailed tariff review, similar to that used for ONA (Open Network Architecture) BSEs (Basic Service Elements).[43] Ameritech, BellSouth, and GTE respond that requiring LECs to satisfy both the revenue neutrality requirement of the restructured services test and the cost support requirements of the new services test would be unreasonably restrictive. Ameritech asserts that 800 data base services are very different from the ONA services addressed in the *Part 69/ONA Order:* unlike those ONA services, 800 data base services require new facilities, and 800 service vertical features are new services rather than preexisting bundled services. SW Bell and US West state further that the new services test is enough, for it provides the only check necessary, an upper bound.[44]

25. All parties commenting on the issue agree with the *Notice*, that new vertical features should be treated as new services under price caps, although Ad Hoc asks that risk premiums not be awarded here and that the Commission require uniformity of methodology.[45]

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[31] *Notice*, at 5431, para. 61.

[32] AT&T Comments at 5; MCI Reply at 2-4.

[33] The initial views of both parties were, however, somewhat different. Ad Hoc initially recommended that basic 800 service be treated as a new service, Ad Hoc Comments at 14-15, and NDC initially asked only that LECs be required to provide cost support for basic 800 service, whether it was new or restructured, NDC Comments at 5-6.

[34] Ad Hoc *ex parte* filing, Oct. 19, 1992; NDC *ex parte* filing, Dec. 2, 1992, quoting from Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6824 (1990) and Erratum, 5 FCC Rcd 7664 (1990)(*LEC Price Cap Order)*, modified on recon.6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order)*, further modified 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order)*, further modified 7 FCC Rcd 811 (1992), appeal docketed, D.C. PSC v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

[35] Ameritech Comments at 3-5; BellSouth *ex parte* filing, Nov. 24, 1992, reversing position of BellSouth Comments at 3-4; GTE Reply at 6-8 (but see GTE Comments at 7 *contra)*; NYNEX Comments at 5-8; Pacific Comments at 3-4; Rochester Comments at 11-14; SW Bell Comments at 7; United Comments at 2-3; USTA Comments at 4-5; US West Comments at 7, quoting from *LEC Price Cap Order*, 5 FCC Rcd at 6824.

[36] Ameritech *ex parte* filing Dec. 4, 1992.

[37] Ameritech Comments at 6-9 (it has spent approximately $50 million for the otherwise unnecessary placement of STPs in every LATA), *ex parte* filing Nov. 5, 1992 (the cost of providing basic 800 data base is about $6 million per year); GTE Comments at 8-9; NYNEX Comments at 8-9; SW Bell Comments at 8; USTA Comments at 6; US West Comments at 8, Reply at 4.

[38] *See, e.g.*, Letter from Anthony Alessi, Ameritech, to Donna Searcy, filed Dec. 4, 1992.

[39] MCI Reply at 5-7.

[40] SW Bell Comments at 8.

[41] NDC Comments at 6.

[42] AT&T Comments at 5-6; MCI Comments at 3.

[43] Ad Hoc Reply at 5; Allnet Reply at 2-3; ARINC Reply at 2-3; AT&T Comments at 5-7, Reply at 4-6; CompTel Comments at 5-7, NDC Comments at 5-6; NYCHA/MasterCard Reply at 1-2; WilTel Reply at 6, 8.

[44] Ameritech Reply at 3; BellSouth Reply at 2; GTE Comments at 7-10; SW Bell Reply 5-6; US West Comments at 8.

[45] Ad Hoc Comments at 11-14; Allnet Reply at 4; BellSouth Comments 3; CompTel Comments at 8; NYNEX Comments at 5; Pacific Comments at 7; US West Comments at 9.

26. *Decision.* We find, as we tentatively concluded in the *Notice*, that basic 800 data base service should be treated as a restructured rather than a new service. At the outset, we note that 800 data base service does not fall squarely within the definitions of either a new or restructured service. Nevertheless, after carefully weighing the alternatives, we find the arguments favoring restructured service to be stronger. Since basic 800 data base service will be replacing the existing NXX service, it will not "add to the range of options already available to customers."[46] Rather it will be a service that 800 service customers are required to take in order to receive 800 service traffic. In addition, basic 800 data base service is more appropriately classified as a restructured service because "the previous version of that service [NXX service] [will] no longer exist[]" after implementation of basic 800 data base service.[47] Furthermore, while the service offers significant public interest benefits, it is, in the final analysis, just a better way to provide 800 access service: it is an improvement of an existing service, not a new service itself. While some LECs note that 800 data base service employs a new technology, that does not, in itself, dictate new service treatment. Therefore, we conclude that basic 800 data base service is best characterized, as NDC suggests, as a change in the "provisioning" of 800 access service, and thus as a restructured service. The new vertical features, however, which the 800 data base system permits LECs to provide, are the new service options available to customers, and they will be treated as new services.

27. We also conclude that, based upon the record before us, it is appropriate to allow the LECs to treat as exogenous the reasonable costs they incurred specifically for the implementation and operation of the basic 800 data base service required by Commission orders. We reach this result in the context of a set of highly unusual circumstances stemming from our finding that 800 data base service should be mandated because it is in the public interest. First, we have required all LECs that currently offer NXX 800 access to provide 800 data base access.[48] Second, administrative actions by this Commission have established stricter access time standards for 800 data base service than those proposed by the LECs, thus increasing the costs associated with the provision of the service.[49] Third, we have required those standards to be met according to a Commission specified schedule.[50] Thus, we have effectively required the implementation of this service and dictated the terms, conditions, and schedule for offering it. Under these circumstances, we conclude that the reasonable costs specific to implementing basic 800 data base service are outside the carrier's control and may, therefore, be treated as exogenous under price cap regulation.[51]

28. We emphasize, however, that exogenous treatment will only extend to those costs incurred specifically for the implementation of basic 800 data base service. Those costs which are not reasonable and which are not specifically incurred for the implementation and operation of the 800 data base system, such as core SS7 costs, will not be afforded exogenous cost treatment. Nor will the costs of accelerating SS7 deployment to meet our implementation timetable be granted exogenous treatment. We anticipate that exogenous treatment will be accorded to those costs associated with: Service Control Points (SCPs), the Service Management System (SMS), and links between SCPs and the SMS, as well as between Signal Transfer Points (STPs) and SCPs, to the extent such costs are directly attributable to 800 data base service. Other expenses may also qualify for exogenous treatment, but as with all these requests for exogenous treatment, the burden is on the LECs to demonstrate that such additional costs are incurred specifically for the implementation of basic 800 data base service.

29. While LEC prices for basic 800 data base service must satisfy the rules for restructured services, we decline to require, at this time, that those prices also satisfy pricing rules for new services. We did apply both sets of requirements to the BSEs in our ONA pricing order, but to the degree that basic 800 data base service is similar to any ONA service, it is comparable to the Basic Serving Arrangements (BSAs) (which were only subject to restructured pricing rules) rather than the BSEs (which were subject to both the new service and restructured service pricing rules).

30. Finally, we believe that applying the cost support requirements of the new service test to vertical features and the exogenous cost standards to basic 800 data base service will prevent the allocation of excessive SS7 costs to the latter. We have already held that LEC investment in SS7 infrastructure elements should be treated as a general network upgrade. Therefore, we will not permit exogenous treatment of SS7 costs that are not incurred specifically for the implementation and operation of the 800 data base system. Furthermore, in response to Ad Hoc, we decline to prejudge the issue of risk premiums here, although we would be surprised if any LECs sought them for any of the vertical services discussed in this order, and we decline to modify the flexible cost support requirement of the new services test by mandating a uniform cost support methodology.

## V. PRICE CAP ISSUES: BASKETS, SERVICE CATEGORIES, AND SUB-INDEXES

### A. Creating a New 800 Data Base Service Category

31. *Pleadings.* Ad Hoc, Rochester, and many IXCs support the *Notice* proposal to create a new 800 data base service category, with five percent upper and lower bounds,

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[46] The *LEC Price Cap Order* also defines new services by stating that "as long as the pre-existing service is still offered, and the range of alternatives available to consumers is increased, we will classify the service as new." 5 FCC Rcd at 6824 para. 314.

[47] *Id.* at 6825, para. 314.

[48] Provision of Access for 800 Service, Memorandum Opinion and Order on Further Reconsideration, FCC 93-54 (released January 29, 1993). While basic 800 data base service was initially proposed by some (but not all) carriers, those proposals were made prior to the adoption of LEC price caps.

[49] *800 Data Base Reconsideration Order*, 6 FCC Rcd at 5425-27.

[50] Id.

[51] We reach this conclusion under Section 61.44(c)(5) of the rules, 47 CFR §61.44(c)(5), pursuant to which the Commission may grant exogenous cost treatment for "other extraordinary exogenous cost changes as the Commission shall permit or require." LEC tariffs for basic 800 data base service shall contain a detailed showing of the costs incurred specifically for the implementation of basic 800 data base service and shall provide a justification for the reasonableness of those costs.

within the traffic sensitive switched basket.[52] MCI argues that 800 data base service prices will be so small relative to other prices in the basket that upper and lower band limits on the basket as a whole would place virtually no constraint on the data base service prices. MCI also asks that the price levels of other relevant categories in the traffic sensitive switched basket be decreased to reflect the removal of 800 data base services from those categories.

32. Five BOCs respond that the Commission has already rejected the creation of a new service category for 800 services, and there is no reason to alter this position. The two other BOCs, joined by Rochester and USTA, state that the current complement of three service categories -- local switching, local transport, and information -- within the traffic sensitive switched basket are operating satisfactorily and do not warrant any change additions. SW Bell asserts that competition exists for the vertical features and it is joined by NYNEX in complaining that additional categories would leave the system too rigid. GTE adds that asymmetric regulation of prices -- regulating LEC prices for the services, but not the prices of LEC competitors -- is unfair. Three BOCs argue that 800 data base services should be included in the existing local transport category, while Rochester and US West state that it should be in the local switching category.[53]

33. *Decision.* We are confident that the revenue neutrality constraint of the restructured service pricing rules will ensure a reasonable initial price for basic 800 data base service and that the new services test will ensure reasonable prices for the vertical subelements. Yet, commenters are correct that the current bands on the traffic sensitive switched access basket will not constrain LECs from making dramatic changes to the prices of the subelements. While the ability of large IXCs to provide their own vertical features would serve as a limited check on excessive vertical feature prices by LECs, LECs would still have the ability to decrease the prices of competitively provided vertical features and increase the price of basic 800 data base service by substantial amounts.

34. The standard that we have employed for creating service categories is to establish one for each Part 69 rate element.[54] Since we establish a new 800 data base service element and sub-elements in this order, we will establish a new data base service category for them within the traffic sensitive switching basket with five percent upper and lower bounds. We believe that this approach 6 will help protect customers against excessive prices for 800 services while granting LECs sufficient pricing flexibility.

**B. Creating a Subindex for Vertical Features**

35. *Pleadings.* Most IXCs and some customers support the *Notice* proposal to establish a separate subindex for 800 data base vertical features, particularly for features not likely to be offered by IXCs, like multiple carrier routing.[55] LECs strongly disagree, answering that vertical features are competitive services, and that regulating them would be meaningless and inconsistent with the principles of price caps.[56] SW Bell argues that the cost support requirements for new services provide enough of a constraint on prices, and that if a subindex were to be imposed it should be used only as a tracking device with a band of plus or minus twenty percent.[57]

36. *Decision.* We agree with the LEC position that competition will place at least some upper bound on the prices that LECs can charge for most vertical features, but we are concerned that LECs may be inclined to charge too little for competitively provided vertical features and too much for basic 800 data base access. There is also the danger that LECs might seek to raise the prices of vertical features, like multiple carrier routing, that are not offered by any IXCs. We believe that the imposition of a subindex for 800 data base vertical features, with five percent upper and lower bounds, can limit these risks without imposing a significant burden on LECs.

## VI. SPECIAL RULES FOR RATE-OF-RETURN CARRIERS

37. In the *Notice*, we asked parties to comment on any changes to the Part 69 rules that would be necessary for rate-of-return carriers to implement this decision. NTCA states that necessary Part 69 rule changes should be rather straightforward, once the policy issues of how to recover 800 data base costs are resolved.[58] OPASTCO states that independent telephone companies (ITCs) would prefer to use a simple average or surrogate method or rule, rather than incurring the costs of detailed studies identifying 800 service costs. It estimates that study costs might well be as large as the access revenues to be recovered from the service.[59] It has suggested that it would probably want to use National Exchange Carrier Association (NECA) data for this purpose. Against a background of no opposing comments, we believe that OPASTCO's request to permit ITCs to use an average or surrogate method or rule that relied on NECA data would probably be economically more efficient than requiring detailed studies and would still produce reasonable results. Therefore, we would be inclined to permit ITCs under rate-of-return regulation to

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[52] Ad Hoc Comments at 15; CompTel Comments at 5; MCI Comments at 3, Reply at 13; Rochester Comments at 10; US Sprint Comments at 1-2.

[53] Ameritech Comments at 10; Bell Atlantic Comments at 1-3; BellSouth Comments at 4, Reply at 2-3; GTE Comments at 10-14; NYNEX Comments at 9-10, Reply at 3-4; Pacific Comments at 7; Rochester Reply at 4-5 (but see contra Rochester Comments at 10); SW Bell Comments at 9-11; USTA Comments at 8-9; US West Comments at 9-10. MCI would also place the services in the local switching category if no new category was formed. MCI Reply at 15.

[54] *LEC Price Cap Order*, 5 FCC Rcd at 6812-13. Our previous rejection of a separate service category for 800 services concerned 800 NXX services, which did not involve any separate Part 69 rate elements.

[55] Ad Hoc Reply at 13; Allnet Reply at 4; CompTel Comments at 9; NYCHA/Master Reply at 4-5 (some services, e.g. multiple carrier routing, are not likely to be offered by IXCs); US Sprint Comments at 1-2; WilTel Reply at 4.

[56] Ameritech Reply at 4; Bell Atlantic Comments at 2 (vertical features are very different from DS1/DS3); BellSouth Comments at 4; GTE Comments at 14; NYNEX Comments at 10; USTA Comments at 7-8; Rochester 15-16 (competition implies the need for great flexibility, and thus bands should permit price changes of plus or minus twenty-five percent); SW Bell Comments at 11; US West Comments at 11-12. Pacific also argues that a single subindex for both basic and vertical features would certainly be more than enough. Pacific Reply at 5.

[57] SW Bell Comments at 12.

[58] NTCA Comments at 3.

[59] OPASTCO Comments at 5-6.

employ reasonable methods of that type. However, in the absence of any more specific proposal, we cannot grant ITCs specific relief of this type at this time.

### VII. CONCLUSION AND ORDERING CLAUSES

38. In conclusion, in this order, we require that LECs price basic 800 data base service on a per query basis. While we do not adopt a specific pricing structure for particular vertical features, we do require LECs to employ rate structures that reasonably reflect the nature of the underlying costs of the services. We also require that LECs subject to price cap regulation treat basic 800 data base service as a restructured service and the vertical 800 data base features as new services under the price cap rules, although we do permit LECs to treat the cost of the basic service as exogenous. Finally, we require these LECs to place all 800 data base subelements into a new separate data base service category within the traffic sensitive switched access price cap basket with a subindex for vertical features, both with five percent upper and lower bounds.

39. Accordingly, IT IS ORDERED, that pursuant to Sections 1, 4(i) and (j), 201-205, 303(r), and 405 of the Communications Act, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 303(r), and 405, Parts 61 and 69 of the Commission's rules, 47 C.F.R. Parts 61 and 69 ARE AMENDED as set forth in Appendix A, effective March 1, 1993.[60]

40. IT IS FURTHER ORDERED that the LECs file tariffs that conform to these rules by March 1, 1993, effective May 1, 1993.

41. IT IS FURTHER ORDERED that Ad Hoc's comments, to the extent they represent a petition for reconsideration, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

### APPENDIX A

### AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Parts 61 and 69 are amended as follows:

### PART 61 - TARIFFS

1. Section 61.42 (e)(1)(vi) is added to read as follows:

Data base access, including basic 800 data base access, call validation, POTS translation, alternate POTS translation, multiple carrier routing, and traffic routing services, as described in Provision of Access for 800 Service, Second Report and Order, 8 FCC Rcd _____, CC Docket No. 86-10, FCC 93-53 (1993) and other such services as the Commission shall permit or require.

2. Section 61.47 (i) is added to read as follows:

Local exchange carriers subject to price cap regulation as that term is defined in § 61.3(v) of this chapter shall use the methodology set forth in paragraphs (a) through (d) of this section to calculate a separate subindex for the 800 data base vertical features offered by such carriers. Notwithstanding paragraph (e) of this section, the annual pricing flexibility for this subindex shall be limited to an annual increase or decrease of five percent, relative to the percentage change in the PCI for the traffic sensitive services basket, measured from the last day of the preceding tariff year.

### PART 69 - ACCESS CHARGES

3. Section 69.118 is revised to read as follows:

**§ 69.118 Traffic sensitive switched services**

Notwithstanding §§ 69.4(b), 69.106, 69.109, 69.110, 69.111, 69.112, and 69.124, telephone companies subject to the BOC ONA Order, 4 FCC Rcd 1 (1988) shall, and other telephone companies may, establish approved Basic Service Elements as provided in Amendments of Part 69 of the Commission's rules relating to the Creation of Access Charge Subelements for Open Network Architecture, Report and Order, 6 FCC Rcd 4524 (1991) and 800 data base subelements, as provided in Provision of Access for 800 Service, 8 FCC Rcd _____, CC Docket 86-10, FCC 93-53 (1993). Moreover, all customers that use basic 800 data base service shall be assessed a charge that is expressed in dollars and cents per query. Telephone companies shall take into account revenues from the relevant Basic Service Element or Elements and 800 Data Base Service Elements in computing rates for the Local Switching, Entrance Facilities, Tandem-Switched Transport, Direct-Trunked Transport, Interconnection Charge, and/or Information elements.

### APPENDIX B

**Comments**

Ad Hoc Telecommunications Users Committee (Ad Hoc)*
Aeronautical Radio, Inc (ARINC)**
Allnet Communications Services, Inc. (Allnet)**
Ameritech Operating Companies (Ameritech)*
American Telephone and Telegraph Company (AT&T)*
Bell Atlantic telephone companies (Bell Atlantic)
BellSouth telephone companies (BellSouth)*
Central Telephone Company (Centel)
Competitive Telecommunications Association (CompTel)

[60] We find good cause for making the rule amendments effective on less than 30 days notice to ensure that LEC tariffs due March 1, 1993 are able to reflect our rate requirements adopted herein. *See* 5 U.S.C. §553(d)(3).

GTE Service Corporation and its affiliated domestic telephone operating Zcompanies (GTE)*
MCI Telecommunications Corporation (MCI)*
National Data Corporation (NDC)*
National Telephone Cooperative Association (NTCA)
New York Clearing House Association and Mastercard International Inc. (NYCHA/ MasterCard)**
NYNEX telephone companies (NYNEX)*
Organization for the Protection and Advancement of Small Telephone Companies (OPASTO)
Pacific Bell (Pacific)*
Rochester Telephone Corporation (Rochester)*
Southwestern Bell Telephone Company (SW Bell)*
US Sprint Communications Company (Sprint)*
United States Telephone Association (USTA)*
US West Communications, Inc. (US West)*
United Telephone System companies (United)*
Williams Telecommunications Group, Inc. (WilTel)**

* also filed reply comments
** only filed reply comments

**SEPARATE STATEMENT**
**OF**
**COMMISSIONER ERVIN S. DUGGAN**

In Re: *Provision of Access for 800 Service* (Second Report and Order in CC Docket No. 86-10)

I support this item because I am generally satisfied with the result. We have correctly classified 800 database access as a restructured service, because it involves provision of the same basic 800 routing service using improved technology.

I have some reservations, however, with respect to our decision to allow exogenous treatment for 800 database costs. The great majority of costs associated with conversion to an 800 database system are properly associated also with present and future network services. Even those costs used solely for 800 database may yield substantial efficiencies and savings to the local companies. I question, therefore, whether exogenous treatment is the proper determination. I am satisfied, however, that our decision here substantially limits the amount of exogenous costs allowed, and that our tariff review process will be strict. Under the unique circumstances presented here by the mandated conversion to 800 database, and because we are treating this as a restructured service, I am satisfied that the result will comport with the public interest.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 11, 1993**

## AMERICAN TELEPHONE AND TELEGRAPH COMPANY FILES PETITION FOR WAIVER OF THE COMMISSION'S DEPRECIATION METHODS AND PROCEDURES

**PUBLIC COMMENT INVITED**

On January 27, 1993, American Telephone and Telegraph Company (AT&T) filed a petition to waive application of the Commission's depreciation methods and procedures to permit AT&T, effective January 1, 1993, to compute and record its regulated depreciation expenses in conformity with depreciation rates it uses for financial reporting purposes. The Commission's rules require AT&T to calculate depreciation expenses for regulated reporting purposes in a manner that differs from the method AT&T employs to calculate depreciation for financial reporting purposes.

AT&T argues that, because it is subject to vigorous competition and other safeguards and is under a unique form of price cap regulation, the Commission no longer needs to calculate depreciation rates for regulated reporting purposes that differ from AT&T's calculation of depreciation rates for financial reporting purposes. AT&T states that, under its form of price cap regulation, a waiver of Commission rules in this regard will have no affect on its price caps or its prices. AT&T also argues that, because of the competitiveness of its markets, the depreciation rates it develops for financial reporting purposes provide a more accurate and reliable measure of its financial condition and assets than rates developed using the Commission's methods and procedures. AT&T points out that it is seeking a waiver of the Commission's depreciation methods and procedures, but will provide to the Commission the methodologies and assumptions used to develop its depreciation rates and expenses for financial reporting purposes.

Interested parties may file comments on AT&T's petition no later than **March 12, 1993.** Replies should be filed no later than **April 2, 1993.** Comments and replies regarding the petition for waiver should reference file number AAD 93-18. Comments should be limited to addressing the waiver of the Commission's depreciation methods and procedures applicable to AT&T. All comments and replies in this proceeding should be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy of each filing should be sent to Sonja J. Rifken and Fatina K. Franklin, FCC, Common Carrier Bureau, 2000 L Street N.W., Room 257, Washington, D.C. 20036, and to the International Transcription Service, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition for waiver may be obtained from ITS at (202) 857-3800.

For further information contact Sonja J. Rifken or Fatina K. Franklin at (202) 632-7500.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-210**

In re Applications of

ROBERT D. JANECEK d/b/a LION'S SHARE BROADCASTING — File No. BPH-900504MD

LOMPOC MINORITY BROADCASTERS PARTNERSHIP — File No. BPH-900518MO

For Construction Permit for a New FM Station on Channel 285A in Lompoc, California

**Appearances**

*David Tillotson*, on behalf of Robert D. Janecek, doing business as Lion's Share Broadcasting; *Benjamin Perez*, on behalf of Lompoc Minority Broadcasters Partnership; and *Y. Paulette Laden*, on behalf of Mass Media Bureau.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ**

**Issued: February 5, 1993; Released: February 12, 1993**

**PRELIMINARY STATEMENT**

1. This proceeding involves the mutually exclusive applications of Robert D. Janecek, doing business as Lion's Share Broadcasting and Lompoc Minority Broadcasters Partnership for a construction permit for a new FM station on Channel 285A in Lompoc, California.[1] The applications were designated for an evidentiary hearing pursuant to a *Hearing Designation Order* (HDO) released in this proceeding on July 24, 1991 (DA 91-837), which specified the following issues:[2]

> (1) If a final environmental impact statement is issued with respect to Lion's Share (Robert D. Janecek) in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. Sections 1.1301-1319.
>
> (2) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (3) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

The issue set forth in one above was rendered moot by the acceptance of an amendment filed by Robert D. Janecek, doing business as Lion's Share, on February 10, 1992, which demonstrated that Mr. Janecek's proposed technical facilities would not result in workers being exposed to levels of RF radiation in excess of those permitted by the Commission's RF exposure guidelines. The above referenced amendment was received by *Order* of the Undersigned (FCC 92M-449), released on April 13, 1992. Thus, of the original issues designated in this proceeding by the HDO, only the so-called standard comparative issue remains to be resolved here.

2. The Commission's HDO found that the technical data submitted by the applicants indicates that there would be a significant difference in the size of the areas and populations to be served by the various proposals. The Commission, accordingly, required that the areas and populations to be served as well as the availability of other primary aural services in such areas be considered under the standard comparative issue. By the Joint Stipulation filed on March 13, 1992, the remaining parties to this proceeding have stipulated that there are at least five FM radio stations providing primary service throughout their entire proposed service areas, and that no decisionally significant differences exist between their respective proposals. As there is no comparative difference between the parties under this issue, no further consideration will be given to this aspect of the standard comparative issue.

3. By *Memorandum Opinion and Order*, (FCC 92M-552), released on May 12, 1992, the issues in this proceeding were enlarged to include the following issues designated against the application of Lompoc Minority Broadcasters Partners (LMBP):

> (4) To determine whether LMBP made a material misrepresentation, or lacked candor, when it certified in its application that it had reasonable assurance that its proposed transmitter site was available;
>
> (5) To determine whether LMBP made a material misrepresentation, or lacked candor, when it certified in its application that it had reasonable assurance of the availability of the funds that it estimated that it would need to construct and operate its proposed station;
>
> (6) To determine in light of the evidence adduced under the foregoing issues whether LMBP is basically qualified to be a Commission licensee.

4. Hearing sessions were held on May 11, 1992, June 9 and 16, 1992 and July 10, 1992. The record in this proceeding was closed on the record on July 10, 1992.

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[1] The application of Great Scott Broadcasting (File No. BPH-900518MM) was dismissed with prejudice by *Order* (FCC 92M-78), released on November 21, 1992, that of John Walton Smith, Jr., doing business as Noe-Wal Broadcasting (File No. BPH-900522MH) by *Order* (FCC 92M-72), released on January 17, 1992, and that of Radio Lompoc Limited Partnership (File No. BPH-900516MS) by the *Hearing Designation Order* (DA 91-837), released on July 24, 1991.

[2] Issues pertaining to applicants no longer parties to this proceeding have been omitted.

## ROBERT D. JANECEK

### Findings of Fact

5. Robert D. Janecek, doing business as Lion's Share Broadcasting, is an individual applicant (Janecek, Ex. 1).

**Diversification**

6. Mr. Janecek has no interests in any medium of mass communications (Janecek, Ex. 1).

**Best Practicable Service**

7. Mr. Janecek proposes to work full-time, at least 40 hours a week, as his station's General Manager. He will be responsible, in this capacity, for overseeing all aspects of the station's operations (Janecek, Ex. 1).

8. Mr. Janecek has lived in the community of license, Lompoc, California, since 1975. He has been a member of its Chamber of Commerce since 1975, serving as a member of its Board of Directors from 1979 until 1982, as Vice-President of its Board in 1982, as the Chamber's Good Will Ambassador from 1982 until 1985, and as Promotion Chairman of the Flower Festival in 1977 and 1978 and then again in 1982 and 1983. He also served as Chairman of the W.C. Fields Festival in 1987 and 1988 (Janecek, Ex. 1). Mr. Janecek was employed in broadcasting in the following capacities from 1959 to 1979: he is a former owner/operator of AM and FM stations in Lompoc, California; a former Executive Vice President and General Manager of a television station in Mitchell/Sioux Falls, South Dakota; a former Sales Manager at television stations in Tyler, Texas, Salinas, California, and Waterloo, Iowa; and a former announcer at television stations in Carbondale, and Anna Jonesboro, Illinois (Janecek, Ex. 1).

**Auxiliary Power**

9. Mr. Janecek will install auxiliary power generators at both his studio and transmitter locations in order to ensure continued operations in the event of a power failure (Janecek, Ex. 1).

## LOMPOC MINORITY BROADCASTERS PARTNERS

### Findings of Fact

10. LMBP is a California general partnership composed of two General Partners: Lydia M. Cordero and Richard P. Keating. Each General Partner owns 50 percent of the partnership equity (LMBP, Ex. 1).

**Diversification**

11. Neither LMBP nor Ms. Cordero nor Mr. Keating has any ownership interests in any medium of mass communications. Mr. Keating is presently employed as General Manager for Caballero Radio West, Inc., the licensee of stations KXEM(AM) and KXEM-FM, in McFarland, California (LMBP, Ex. 2; Tr. 37-38). At the time LMBP filed its application, Mr. Keating was employed by Caballero Radio West, Inc. as the General Manager of station KNEZ(AM), Lompoc, California, in addition to being employed at the KXEM stations. Although a reference was made in LMBP's application to his position at station KNEZ(AM), and his intention to resign this position and terminate all relationships with that station in order to work at LMBP's proposed station (Tr. 38-39), no reference was made in the application of any intention to resign from his employment as the General Manager of the KXEM stations, in the event that the LMBP application is granted (Tr. 38-40).

**Best Practicable Service**

12. LMBP does not propose to integrate any part of its ownership into the management and operation of its proposed station.

**Auxiliary Power**

13. LMBP does not propose to install an auxiliary power source at its studio or transmitter sites in the event that its application is granted.

**Site Misrepresentation Issue**

14. LMBP's application, when filed, contained a certification that it had a reasonable assurance of the availability of a site for its antenna. The owner of the site was identified in LMBP's application as G.W. Vance (Janecek, Ex. 2). However, the person actually contacted by LMBP's principal, Richard Keating, was George Robert Vance (LMBP, Ex. 14, and 14G). At the time he was approached by Mr. Keating, Mr. Vance was in poor health and, according to Mr. Keating's own testimony, did not want to deal with the details of a lease agreement (LMBP, Ex. 14). He referred Mr. Keating to his attorney, Terrill F. Cox. Mr. Cox was not contacted by Mr. Keating until several days after LMBP's application containing the site certification was filed (LMBP, Ex. 14). It was at this meeting with Mr. Cox that Mr. Keating was informed by the former that Mr. Vance did not own the land in question, and that he believed that the true owners were Stanley Hollister and William Sudden (LMBP, Ex. 14). Mr. Keating contacted the Messrs. Hollister and Sudden on May 22, 1990 and was told that they did in fact own the land, and the owners gave Mr. Keating a letter stating that the site was available for use as a radio broadcast site, subject to the working out of a lease agreement between the parties (Janecek, Ex. 3). According to Mr. Keating's testimony, he did not tell the owners of the land anything about the type of facility that LMBP proposed to build, and he did not have any discussion with them about the terms of such a lease agreement (Tr. 143-45); Mr. Hollister, actually, at the time tried to talk Mr. Keating out of even considering the property since he did not consider it suitable for its intended purpose Tr. 146-47).

15. It is abundantly clear from the evidence of record that Mr. Keating did not have a reasonable assurance of site availability for LMBP's transmitter at the time he filed his application. Mr. Vance told him, simply, that he was willing to consider leasing the land, which he, in fact, did not own, but that all details would have to be worked out with his attorney. Despite this clear directive from the apparent owner of the property, Mr. Keating did not contact the attorney in question until after LMBP filed its application. Clearly, there could not have been the requisite meeting of the minds when one of the parties refused to discuss the details of any projected lease, and, indeed, was not even the owner of the property in question. Mr. Keating, under the circumstances just described, did not even have a possibility that the site might be available at that time: certainly an insufficient basis for finding that Mr. Keating had a reasonable assurance of the availability of a transmitter site. See, *Dutchess Communications Corp.*, 101 F.C.C. 2d. 243, 253

(Rev. Bd. 1985). Accordingly, the Presiding Judge finds that LMBP's representation that it had a reasonable assurance of an antenna site, as set forth in its application, constituted a material misrepresentation to this Commission, which requires that LMBP be found unqualified, and it will be so ordered. There is some evidence of record that the site may not be available to LMBP. Specifically, the testimony of Mr. Hollister at the hearing in which he appears to equivocate as to the land's availability, noting that he tried to talk Mr. Keating out of using the land (Tr. 148), and the site availability letter itself which indicates that agreement and negotiations are necessary with respect to the details, cost, and duration of any lease agreement (Janecek, Ex. 3). However, in light of LMBP's disqualification under the site certification issue, we do not have to address that matter here.

**Financial Misrepresentation Issue**

16. LMBP states that the source of financing for its proposed station is the MBank, N.A., El Paso, Texas (LMBP, Ex. 13C). Mr. Keating testified that he had a good working relationship with Steven M. Curl, Senior Vice-President of MBank El Paso at the time he secured the letter. He mentioned that Mr. Curl was familiar with the efforts he made in improving the operations of two radio stations purchased with a loan from MBank El Paso. He asserts that his positive relationship with the bank in question continued through a series of loans secured from the bank, beginning in January 1985 and ending on December 15, 1986 (LMBP, Ex. 13B). Mr. Curl, in his written testimony, confirmed the fact that he was familiar with Mr. Keating and his business qualifications, having observed first hand how he managed to operate profitably two radio stations (LMBP, Ex. 13A, p. 1); and that at the time of the issuance of the May 17, 1990 letter, he, Mr. Curl, had reviewed Mr. Keating's plan for the proposed station, the amount of the financing needed, the proposed loan structure, and how the loan would be repaid (LMBP, Ex. 13A, p. 1).

17. The Presiding Judge concludes that the evidence of record supports the finding that at the time LMBP certified to its financial qualifications, it had a reasonable assurance of the availability of the necessary funds to construct and operate the station for three months without revenues. Mr. Keating dealt with an officer of the bank who was familiar with his financial status, having issued loans to him in the near past, and with his ability to operate a radio station successfully. This prior relationship and the knowledge gained therefrom formed a reasonable basis from Mr. Curl to issue the financing letter which provided LMBP with the required reasonable assurance that the necessary funds would be available in the event that it was the successful applicant. Accordingly, the false financial certification issue designed against the application of LMBP is resolved in LMBP's favor.

**ULTIMATE CONCLUSIONS**

18. In the event that the Presiding Judge's disqualification of LMBP is reversed on appeal, the comparative qualifications of the two applicants will now be considered. Mr. Keating did not make a timely commitment to resign his position as General Manager at stations KMEX-AM and FM, and since these stations are located in California, a moderate demerit must be assessed against the LMBP's application under the diversification criterion. As to the best practicable service criterion, LMBP does not propose any integration, whereas, Mr. Janecek proposes 100 percent full-time integration, which is qualitatively enhanced by his long term residence in Lompoc, California with some participation in the civic activities of the community, and to a further, slight extent by his past broadcast experience. Accordingly, Mr. Janecek's application is entitled to a substantial preference under this criterion. His application is also entitled to a further, slight comparative credit for his proposal to install an auxiliary power source at his studio and transmitter locations. As noted above, LMBP does not make a similar proposal.

19. Under the standard comparative issue Mr. Janecek is the clear winner, and as the sole remaining qualified applicant for the facility in Lompoc, California, his application will be granted.

20. One final matter requires consideration. LMBP argues in its proposed findings and its reply that the HDO should have dismissed Janecek's application. The HDO thoroughly discussed the matters raised by LMBP, and its attempt to revisit the matter here is prohibited by Section 1.115(e)(3) of the Commission's Rules, which requires deferral of questions such as these until an application for review is filed with the Commission's Review Board.

**RULINGS**

IT IS ORDERED that Lompoc Minority Broadcasters Partnership (File No. BPH-900518MO) is found not to be qualified to be a Commission licensee and its application IS DISMISSED; that the application of Robert D. Janecek d/b/a Lion's Share Broadcasting (File No. BPH-900504MD), the sole remaining qualified applicant for a construction permit for a new FM station on channel 285A in Lompoc, California IS GRANTED.[3]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 17, 1993**

## EXAMINATION TOPICS AND QUESTIONS FOR COMMERCIAL RADIO OPERATOR LICENSES SOLICITED

This *Public Notice* solicits private sector assistance in updating the commercial radio operator examinations. Suggestions for topics and questions for the common question pool for these examinations may be submitted by any individual or entity, and may relate to any examination element. We especially are interested in receiving input concerning examination questions for the two new GMDSS licenses. To be considered, general topic suggestions and specific questions must be in typed form and submitted by **March 31, 1993.** Suggestions concerning general topics that should be covered must specify the particular element or license with which they are associated and must include a narrative on why they are important. Each question must be stated as a complete sentence and may refer to a diagram. For each question, the following information must be included:

1. Element number associated with the question.
2. Correct answer and at least three multiple choice distracters.
3. Name of source document upon which it is based, and
4. Citation for answer.

Two paper copies of suggested topics and questions are to be submitted to: Federal Communications Commission, Personal Radio Branch, Room 5322, Washington, D.C. 20554 Attention: COLE Questions. Entities submitting ten or more questions are requested to include a disk formatted for IBM-compatible systems listing the questions using Word Perfect 5.1. No submission will be returned.

Parties submitting topics or questions are encouraged to familiarize themselves with the Commission's Report and Order in FO Docket No. 92-206. This Report and Order privatized the administration of examinations for commercial radio operator licenses and established rules for implementing privatization. Copies can be obtained from the Commission's copy contractor: International Transcription Service Inc., 2100 M Street, N.W., Suite 140, Washington, DC 20037, telephone (202) 857-3800.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

Fred Daniel d/b/a
Orion Telecom

and

Paging Systems, Inc.

For New Automated
Maritime Telecommunications
Systems at Seattle,
Washington

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 1, 1993; Released: February 12, 1993**

By the Chief, Special Services Division:

1. On December 23, 1991, Paging Systems, Inc. (Paging) filed an application for an Automated Marine Telecommunications System (AMTS) station to be located in the vicinity of Seattle, Washington. This application was listed on Public Notice number 1623, released on January 24, 1992. Kelly Television Co. (Kelly) filed a Petition to Deny with the Private Radio Bureau on February 24, 1992.

2. On January 31, 1992, Fred Daniel d/b/a/ Orion Telecom filed an application for an AMTS station to be located in the vicinity of Seattle, Washington. This application was listed on Public Notice number 1633, released on April 3, 1992. Kelly filed an Opposition with the Private Radio Bureau on April 10, 1992. Kelly is the present licensee of KCPQ(TV), a channel 13 television station situated in Tacoma, Washington. This action decides Kelly's Petitions to Deny the AMTS applications of Paging and Orion together because Kelly's petitions are substantively indistinguishable.

3. AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other marine vessels. In establishing the rules permitting AMTS stations, the Commission considered the potential for interference to television reception, particularly channels 13 and 10 because of the proximity of AMTS channels, and conditioned the operation of AMTS coast stations on the requirement that no harmful interference will be caused to television reception. *See* 47 C.F.R. § 80.215(h). In filing the above captioned applications, Orion and Paging have complied with all requirements set forth by the Commission in Section 80.215(h) to establish service including service contours, engineering studies, and appropriate showings of non-interference.

4. In its Petitions to Deny, Kelly relies on two substantive arguments. First, Kelly states that the AMTS applications of Paging and Orion should be denied because they failed to provide reasonable assurance of the transmitter sites proposed in their applications. Second, Kelly contends that the proposed sites of applicants will cause harmful interference with its operations. With respect to Kelly's first contention, we note that Private Radio applicants are not required to determine the availability of their transmitter sites at the time they file their applications. *See In re Application of Fred Daniel d/b/a Orion Telecom*, DA 92-1759, 8 FCC Rcd 171 (1993); *In re Applications of Lynn Twedt, et al.*, FCC No. 92-234, 7 FCC Rcd 3965 (1992). Further, we note that because the applicants have complied with the requirements described in Section 80.215, Kelly's allegations of potential interference are not persuasive in the absence of further evidence. In addition, should any interference arise in the future, Orion and Paging are charged with the responsibility to resolve any interference caused by their operations or discontinue operations. *See* 47 C.F.R. § 80.215(h)(4). We therefore find Kelly's substantive arguments to be without merit.

5. For the reasons stated above, we conclude that petitioner's Petitions to Deny are without merit. Accordingly, IT IS ORDERED that the Petition to Deny the Application of Fred Daniel d/b/a Orion Telecom filed by Kelly Television Co. IS DENIED and Orion Telecom's application for a new Automated Maritime Telecommunications System IS GRANTED.

6. In addition, IT IS FURTHER ORDERED that the Petition to Deny the application of Paging Systems, Inc. filed by Kelly Television Co. IS DENIED and Paging Systems' application for a new Automated Maritime Telecommunications System IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division
Private Radio Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY

Petition for Waiver of Comparably
Efficient Interconnection Requirements
of Third Computer Inquiry

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 5, 1993; Released: February 12, 1993**

By the Chief, Common Carrier Bureau:

1. On August 18, 1989, the American Telephone and Telegraph Company (AT&T) filed a petition requesting waiver of the comparably efficient interconnection (CEI) requirements established in the *Computer III* proceeding as applied to its offering of DIAL IT 900 Service Call Count Arrangements.[1] On October 6, 1989, the Common Carrier Bureau granted AT&T temporary authority to continue offering the 900 Service Call Count Arrangement without CEI, pending action on AT&T's petition.[2] In this Order, we dismiss AT&T's petition as moot since AT&T's offering of DIAL IT 900 Service Call Count Arrangement is no longer subject to the Commission's CEI requirement.

2. On August 1, 1991, the Commission adopted a Report and Order in the *Interexchange Proceeding* further streamlining the tariff regulation of certain of AT&T's business services.[3] In that order, the Commission eliminated the CEI requirements for enhanced services that rely exclusively on basic services subject to further streamlined regulation.[4] The Commission stated that AT&T's 900 Services were among the services subject to further streamlined regulation.[5] AT&T states that 900 service is the basic service underlying its 900 Service Call Count Arrangement enhanced service.[6] Therefore, we dismiss as moot AT&T's petition for waiver of the Commission's *Computer III* comparably efficient interconnection requirements.

3. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91, 0.291, AT&T's petition for waiver of the comparably efficient interconnection for the provision of 900 Service Call Count Arrangement is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations, (*Computer III*), CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration Order*), *Phase I Order* and *Phase I Reconsideration Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990)(*California*); Phase II, CC Docket No. 85-229, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*); *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*), *Phase II Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[2] Petition for Waiver of Comparably Efficient Interconnection Requirements Of Third Computer Inquiry, Memorandum Opinion and Order, 4 FCC Rcd 7581 (1989).

[3] Competition in the Interstate Interexchange Marketplace, *Report and Order*, 6 FCC Rcd 5880 (1991) (*Interexchange Order*).

[4] 6 FCC Rcd 5910 at para. 182.

[5] 6 FCC Rcd 5894 at n.123.

[6] AT&T Petition for Waiver of Comparably Efficient Interconnection Requirements of Third Computer Inquiry at 3, n.1.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

National Exchange Carrier Association

Revisions to Tariff F.C.C. No. 5 — Transmittal Nos. 518, 527, 530

Universal Service Fund and
Lifeline Assistance Rates

**ORDER**

**Adopted: February 5, 1993; Released: February 5, 1993**

By the Chief, Common Carrier Bureau:

## I. INTRODUCTION

1. On November 17, 1992, the National Exchange Carrier Association, Inc. (NECA) filed Transmittal No. 518 to increase its Universal Service Fund (USF) monthly rate from 39.01 cents to 46.24 cents per line and to increase its Lifeline Assistance (LA) monthly rate from 7.33 cents to 7.77 cents per line.[1] On December 28, 1992, NECA filed Transmittal No. 527, revising the USF rate downward to 46.04 cents per line.[2] On December 31, 1992, NECA filed Transmittal No. 530 to make its revised USF rate effective beginning January 31, 1993. In Transmittal 518 NECA proposed an increase of $60 million above the current six-month USF revenue requirement of $309 million; Transmittal 527 revised that USF rate increase downward to $58.5 million. NECA's LA filing represents an increase of $7.9 million above the current six-month revenue requirement of $116.2 million. Both the USF and LA rates were originally scheduled to become effective for the six-month period from January 1, 1993 through June 30, 1993.

2. MCI Telecommunications Corporation (MCI) filed a petition on December 2, 1992, to reject or, alternatively, to suspend and investigate Transmittal 518. American Telephone and Telegraph Company (AT&T) filed a petition on the same date to suspend and investigate the transmittal. Neither carrier opposes the LA rate. NECA filed its reply to these petitions on December 14, 1992.[3] For the reasons discussed below, we suspend Transmittals 518 and 530 for one day, impose an accounting order, and initiate an investigation of the USF rate.

## II. SUMMARY OF PLEADINGS

3. MCI argues that growth in loop costs for LECs receiving USF revenues is abnormally high when compared to other LECs. MCI Petition at 3. MCI questions NECA's ability to audit properly member companies' data underlying the USF revenue requirement. *Id.* MCI claims NECA's resizing calculation resulted in a double counting of carrier expense adjustments. *Id.* MCI also claims numerous discrepancies exist between LEC data submitted to NECA for USF computations and similar data given to the Rural Electrification Administration (REA). *Id.*

4. MCI criticizes the USF program as giving LECs the incentive to over-allocate certain investment and expenses to the USF revenue requirement categories. *Id.* at 4. MCI contends the transition away from the frozen subscriber plant factor has been more than compensated by USF, resulting in windfall profits for LECs in jurisdictions where state regulatory authorities did not recognize that jurisdictional cost shifts were occurring. *Id.* at 5-7.

5. AT&T claims it has conducted a growth analysis of NECA's cost company study areas, using a methodology similar to the Commission's trend and cross-sectional analyses of prior annual access filings, showing that the USF is overstated by $33.7 million due to anomalously high growth in costs. AT&T Petition at 4-6. AT&T contends NECA has overstated costs by $5.3 million due to improper classification of remote central office equipment. *Id.* at 6 n.14. In addition, AT&T attributes an alleged $7.3 million USF overstatement to inconsistencies between data filed with NECA and similar data filed with the REA. *Id.* at 9-11.

6. AT&T further contends the USF is overstated by $21.4 million in relation to unexplained resizing computation adjustments. *Id.* at 7-9. AT&T also claims a cost overstatement of $22.8 million because NECA adjusted 1991 reported investment data to reflect a corrected separations study by New Jersey Bell, but failed to revise reported investment for prior years. *Id.* at 9 n.16.

7. In its reply, NECA argues that MCI has presented no legal ground for rejection or suspension of the proposed USF rate, only inappropriate policy arguments. NECA Reply at 4. NECA contends MCI's attack on the Commission's separations rules is outside the scope of review of a tariff filing. *Id.* NECA then asserts that its calculation of the USF rate is based upon actual historical costs that have been incurred by exchange carriers and allocated to the USF in accordance with Commission rules. *Id.*

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[1] NECA collects these rates from the largest interexchange carriers (IXCs) on the basis of each IXC's total number of presubscribed lines. NECA then distributes these funds to promote affordable telephone service among high cost LECs and low income subscribers.

[2] The rates proposed in Transmittal 527 reflected corrections by some local exchange carriers (LECs) in response to *RAO 21*. Responsible Accounting Officer Letter No. 21, Classification of Remote Central Office Equipment for Accounting Purposes, DA 92-1091, released by the Chief, Accounting and Audits Division on August 7, 1992 and revised on September 8, 1992, DA 92-1225 *(RAO 21)*.

[3] NECA filed errata to its reply on December 15, 1992 and December 21, 1992. The Bureau permitted the LA rate, along with that portion of the USF increase pertaining to the final step of an eight-year transitional phase-in of the USF expense adjustment based on the existing revenue requirement, which is not at issue, to take effect on January 1, 1993. Special Permission No. 92-995.

8. In response to AT&T's allegations, NECA argues that AT&T's analysis is flawed, and that costs identified by AT&T as falling more than one standard deviation above the average cost are not necessarily artificially inflated. *Id.* at 5, 7-9. NECA also claims the AT&T study is weak because it examines only one year's growth changes, a method which misses business decisions that may raise all costs in one year, but lower them in future years. *Id.* at 8-9.

9. With respect to AT&T's claim that NECA has overstated costs due to improper classification of equipment, NECA contends AT&T's analysis is unreliable because it is based on a comparison of REA data with NECA data. NECA claims such a comparison is invalid due to several factors, including different reporting periods and different study areas. *Id.* at 9-12. NECA rejects as irrelevant AT&T's attribution of additional cost overstatements to inconsistencies between REA and NECA data. *Id.* at 14-16.

10. Finally, NECA disputes AT&T's allegation that NECA has miscalculated the amount required for resizing, arguing that AT&T's computations relate to a period for which the resizing is no longer applicable. *Id.* at 12-14. NECA disagrees with AT&T that a corrected separations study by New Jersey Bell should be used to adjust retroactively the national average of loop cost for the years 1988 through 1990, contending that it was proper to consider New Jersey Bell's revised data on a forward-looking basis. *Id.* at 14.

## III. DISCUSSION

11. The Common Carrier Bureau has reviewed the tariff transmittals, the concerns raised by petitioners, and NECA's response to those concerns. The Common Carrier Bureau believes the instant transmittals raise an additional issue not raised by the parties. In particular, NECA's resizing and adjustment procedures, which provide a mechanism for NECA to adjust the charges to interexchange carriers to reflect any updates in the USF costs filed by LECs, appear to inflate unreasonably the amount of USF payments. While we cannot conclude at this time that the tariff revisions filed by NECA are patently unlawful so as to warrant rejection, we do conclude that sufficient questions have been raised regarding the lawfulness of Transmittals 518 and 527 to warrant suspension for one day and investigation of the reasonableness of NECA's USF rate. In an order to be released shortly, we will designate the specific issues under investigation and establish a pleading cycle.

## IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. Sections 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by the National Exchange Carrier Association, Inc. in Tariff F.C.C. No. 5, Transmittal Nos. 518 and 527.

13. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. Section 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. Section 0.291, the instant tariff revisions filed by National Exchange Carrier Association, Inc. ARE SUSPENDED for one day.

14. IT IS FURTHER ORDERED that National Exchange Carrier Association, Inc. SHALL FILE a supplement reflecting this suspension no later than five business days from the release of this Order. Special Permission No. 93-148 is assigned for this purpose.

15. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. Sections 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. Section 0.291, National Exchange Carrier Association, Inc. shall keep accurate account of all amounts received pursuant to the rates which are the subject of this investigation.

16. IT IS FURTHER ORDERED that the petition to suspend and investigate National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Transmittal No. 518, filed by American Telephone and Telegraph Company IS GRANTED and the petition to reject or alternatively, to suspend and investigate Transmittal 518 filed by MCI Telecommunications Corporation, IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

LDDS Communications, Inc. File No. I-T-C-92-162

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Private Line Services Between the United States and Israel

**ORDER AND CERTIFICATION**

**Adopted: February 4, 1993; Released: February 12, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international private lines for the provision of international private line services to the general public by LDDS Communications, Inc. (LDDS).[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-162 IS GRANTED and LDDS is authorized to resell international private lines not interconnected to the public switched network for the provision of international private line services between the United States and Israel only.[2]

3. IT IS FURTHER ORDERED that LDDS is authorized to lease and operate one-half interest in up to three 64-Kbps circuits from authorized U.S. common carriers for the provision of its authorized resale of international private lines for private line services.[3]

4. IT IS FURTHER ORDERED that neither LDDS nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which LDDS or any such persons or companies controlling or controlled by LDDS are parties.

5. IT IS FURTHER ORDERED that LDDS shall file publicly:

(a) tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61; or

(b) a copy of any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. § 203, and the *Interexchange Order*.[4]

6. IT IS FURTHER ORDERED that LDDS shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

7. IT IS FURTHER ORDERED that LDDS shall file semi-annual reports of circuit additions to certificated points, pursuant to Section 63.10 of our Rules, 47 C.F.R. § 63.10.

8. IT IS FURTHER ORDERED that LDDS shall file a copy of any operating agreements entered into with foreign correspondents in Israel and shall file them with the Commission within 30 days of their execution.

9. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services LDDS seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

11. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

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[1] LDDS is a nondominant common carrier providing international IMTS between the United States and various international points. (*see* I-T-C-90-009-T/C, DA-90-130, released February 5, 1990) and domestic interstate and intrastate services.

[2] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (Phase II Third Further Notice), 7 FCC Rcd 7927 (1992).)

[3] LDDS has stated that it intends to lease and operate the international private line circuits from MCI Communications, Inc., AT&T Communications, Inc., and U.S. Sprint.

[4] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991) (*Interexchange Order*).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P.

File No. I-T-C-92-269

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier service between the United States, on the one hand, and St. Vincent, British Virgin Islands, St. Kitts/Nevis, Montserrat, St. Lucia, Grenada and Dominica, on the other hand.

## ORDER AND AUTHORIZATION

**Adopted: February 4, 1993; Released: February 12, 1993**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 29, 1992 by Sprint Communications Company L.P. (Sprint), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. on the one hand, and St. Vincent, British Virgin Islands, St. Kitts/Nevis, Montserrat, St. Lucia, Grenada and Dominica, on the other hand.[1] The application was placed on public notice on October 7, 1992. No comments were received.

2. Sprint is a non-dominant international carrier currently providing international services to the points reached via the PTAT-1 cable system. Sprint has been authorized to acquire and operate capacities in the PTAT-1 cable system for service between the U.S. and Bermuda. It now proposes to acquire and operate additional facilities in PTAT-1 and the CARAC Cable to provide service to the points requested. Sprint will be using the capacity in PTAT-1 to supplement existing facilities and not to divert any portion of its traffic from other existing common carrier facilities.

3. The Commission stated in its Private Submarine Cable Decision[2] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[3] In this context, we find that Sprint's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[4] Furthermore, we find that Sprint's application does not raise any economic impact issues.[5]

4. Upon consideration of the application, IT IS HEREBY CERTIFIED that the public convenience and necessity require the provision of direct service between the U.S., on the one hand, and St. Vincent, British Virgin Islands, St. Kitts/Nevis, Montserrat, St. Lucia, Grenada and Dominica, on the other hand, by Sprint.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-92-269 IS GRANTED and Sprint is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate 102 voice-grade circuits in the PTAT-1 cable between the U.S. and Bermuda;

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[1] In its application Sprint requests authority to acquire and operate facilities for the provision of common carrier services between the United States and certain specific points. We note that should Sprint obtain any interest in facilities beyond the points specifically requested for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for Sprint to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[2] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[3] This requirement was restated in the *International* decision in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. § 63.01.

[4] The Commission places no special burdens on any carrier filing an application to use private cable capacity. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989)(Pacific Telecom decision).

[5] In its Pacific Telecom decision, the Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

b. acquire, on an IRU basis, a one-half interest in and operate 102 voice-grade circuits in the Caribbean Atlantic Cable System (CARAC) between Bermuda and Tortola;

c. lease and operate 102 voice-grade connecting circuits between the Sprint's New York office and the PTAT-1 cable terminal in New Jersey;

d. lease a one-half interest in and operate the following capacity in the Digital Eastern Caribbean Microwave System (DECMS); and

| Segments | No. of Circuits |
|---|---|
| Tortola - St. Lucia | 46 |
| St. Lucia - St. Vincent | 16 |
| St. Lucia - Grenada | 14 |
| Tortola - Montserrat | 8 |
| Tortola - St Kitts | 12 |
| Tortola - British Virgin Islands | 22 |
| Tortola - Dominica | 14 |

e. use said facilities to provide Sprint's regularly authorized services between the U.S. and the following points:[6]

| Country | No. of Circuits |
|---|---|
| St. Lucia | 16 |
| St. Vincent | 16 |
| Grenada | 14 |
| British Virgin Islands | 22 |
| St. Kitts/Nevis | 12 |
| Montserrat | 8 |
| Dominica | 14 |
| | Total 102 |

6. IT IS FURTHER ORDERED that our authorization of Sprint to provide private lines is limited to the provision of such private lines only between the United States and the points listed above -- that is, private lines which originate in the United States and terminate in one of the specific points listed or which originate in one of the specific points listed and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that Sprint's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992).

7. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

8. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between Sprint and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. §43.51(a)(3)).

9. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

10. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

11. IT IS FURTHER ORDERED that this authorization is subject to the terms and conditions of any license issued to PSI herein under the act entitiled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[6] Sprint states that its correspondents have agreed to provide all required matching facilities.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MEGASTAR, INC. File No. I-T-C-92-202

Application for Authority to
provide international television
service and video service via the
TDRS-41 and TDRS-174 Satellites

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: February 4, 1993; Released: February 12, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international television and video services by Megastar, Inc. (Megastar).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-202 IS GRANTED, and Megastar is authorized to establish a total of two (2) 36-MHz channels per satellite and two (2) 64-kbps private line circuits, not inter-connected with the public switched network, between appropriately licensed earth stations in the U.S. and the TDRS-41 and TDRS-174 satellites for the provision of international television service, video service, and private line service between the U.S. and currently authorized points of communications listed in Appendix A as well as those points which the Commission may authorize in the future to be served by the TDRS-41 and TDRS-174 satellites.

3. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this order.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

5. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

6. IT IS FURTHER ORDERED that the applicant shall file for separate Section 214 authorizations for additional private line circuits over the TDRS satellites.

7. IT IS FURTHER ORDERED that any authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and the countries listed in Appendix A -- that is, private lines which originate in the United States and terminate in one of the countries listed in Appendix A or which originate in one of the countries listed in Appendix A and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that the applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administrations afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992).

8. IT IS FURTHER ORDERED that the authority granted herein for the applicant to establish channels of communication between the earth stations in the U.S. and the TDRS satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites for the provision of the service(s) authorized herein.

9. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

10. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent in each of the countries to which it is authorized to provide service, and the applicant shall file copies of the agreement with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. §43.51(a)(3)).

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

## APPENDIX A

| TDRS-41 | TDRS-174 |
|---|---|
| Austria | Hong Kong |
| Bahamas | Mexico |
| Belgium | Philippines |
| Canada | |
| France | |
| Germany | |
| Ireland | |
| Israel | |
| Jamaica | |
| Luxembourg | |
| Mexico | |
| Netherlands | |
| Portugal | |
| Sweden | |
| Switzerland | |
| United Kingdom | |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

IDB AERO-NAUTICAL COMMUNICATIONS, INC.

File Nos. I-T-C-92-058
I-T-C-92-059
I-T-C-93-013
I-T-C-93-014

Applications for Authority to Provide International Land Mobile-Satellite Services Outside of North America via the Inmarsat System

**MEMORANDUM OPINION, ORDER AND CERTIFICATE**

**Adopted: February 2, 1993; Released: February 12, 1993**

By the Chief, International Facilities Division:

1. On December 6, 1991, IDB Aero-Nautical Communications, Inc. (IDB) filed applications pursuant to Sections 503 and 504(c) of the International Maritime Satellite Telecommunications Act and Section 214 of the Communications Act of 1934, as amended, for authority to provide international land mobile-satellite services (LMSS) to mobile-satellite terminals outside of North America via the International Maritime Satellite Organization (Inmarsat) First and Second Generation satellites. We also have consolidated into this proceeding consideration of IDB's request to provide such services on Inmarsat Standard C terminals.[1] The Communications Satellite Corporation (Comsat) filed the only comments in this proceeding, stating that to enhance U.S. competitiveness, the Commission should promptly grant these applications. For the reasons discussed below, we grant IDB's applications.

## I. THE APPLICATIONS

2. IDB requests authority to provide international LMSS[2] to any eligible mobile-satellite terminal in any foreign point outside North America reached by the Inmarsat System.[3] IDB proposes to provide such services in: 1) the Atlantic Ocean Region-East (AOR-E) via Southwest Communications, Inc.'s (SCI's)[4] authorized fixed land earth station (LES)[5] at Staten Island, New York (call sign KA-227); 2) the Atlantic Ocean Region-West (AOR-W) and Pacific Ocean Region (POR) via SCI's authorized fixed LES at Niles Canyon, California (call signs KA-63 and KA-76, respectively); and 3) in the Indian Ocean Region (IOR) via OTC Limited of Australia's foreign fixed LES at Perth, Australia. As noted above, IDB has subsequently requested authority to provide Inmarsat-C international LMSS in: 1) the ship-to-shore direction in the AOR-E via PTT Telecom Netherlands' foreign fixed LES at Burum, the Netherlands; 2) the ship-to-shore direction in the POR via the Perth, Australia foreign LES; 3) the ship-to-shore and shore-to-ship directions in the IOR via the Perth, Australia foreign LES; and 4) the ship-to-shore direction in the AOR-W via Comsat's LES at Southbury, Connecticut.

3. IDB does not herein seek authority to construct or operate new satellite or fixed land earth station telecommunications facilities or to offer any new types of service to land mobile-satellite terminals, other than the types of services it already is authorized to, or has applied for authorization to, offer to maritime and aeronautical mobile-satellite terminals.[6] IDB proposes to provide international LMSS consistent with the frequency bands the Commission has allocated for maritime services.[7] This

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[1] *See IDB Aero-Nautical Communications, Inc.*, (File Nos. I-T-C-93-013 and I-T-C-93-014), DA 93-116, adopted January 29, 1993, wherein we deferred consideration of IDB's request to provide Inmarsat-C LMSS to this proceeding.

[2] The term "international" LMSS, as used in IDB's applications, refers to (1) mobile-satellite communications (via fixed land earth stations in the United States, the Netherlands, and Australia) within and between foreign countries, excluding Canada and Mexico, and (2) communications between fixed land earth stations in the United States, the Netherlands and Australia and mobile-satellite terminals located outside of North America. For purposes of these applications, North America is defined as comprising the land area of Canada, Mexico, and the United States. The United States includes Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.

[3] IDB has categorized this request as one for "blanket" authority. However, we do not choose to use this term due to the ambiguity between this and other cases where blanket authority is used to license a large number of mobile terminals. Here, we are not licensing the mobile-satellite terminals used to provide LMSS, but instead grant authority to provide land mobile-satellite service to those mobile-satellite terminals already licensed by the foreign telecommunications authority of the country in which the terminals operate.

[4] IDB's application states that it will utilize its own land earth stations to provide international LMSS. However, subsequent to the filing of IDB's subject applications, the Commission approved the assignment of the Title III radio licenses for these land earth stations to Southwest Communications, Inc. *See CICI Inc. and IDB Communications Corporation*, 7 FCC Rcd 6031 (Int. Fac. Div. 1992). IDB has informed the Commission's staff that it still plans on utilizing these land earth stations. We note that IDB is currently providing international LMSS via SCI's stations pursuant to special temporary authority originally granted to IDB prior to the assignment of the earth station licenses. *See* Special Temporary Authority, TAO-2081, granted August 7, 1992. However, before IDB can continue offering international LMSS from SCI's fixed land earth stations, the licenses of these earth stations must be modified to provide for international LMSS. Therefore, part of this grant will be contingent on SCI receiving authority to provide international LMSS via its land earth stations consistent with this Order.

[5] IDB uses the term "coast earth station" instead of "land earth station" in its application. For purposes of conformity, we will refer to these stations as "land earth stations," as does Inmarsat in its Convention. *See Inmarsat Basic Documents*, (4th ed. 1989).

[6] A service is defined both by the type of terminal served (*e.g.* Standard A and C) and by the type of transmission carried by that terminal (*e.g.* voice, data or compressed video).

[7] The only portions of the proposed satellite communications services that will occur actually within the United States will be satellite uplinks from, and downlinks to, SCI's and Comsat's U.S. fixed LESs operating in C-Band (except for narrowband pilot, test, and order wire signals operating in the L band). IDB

proceeding is limited to the terms of IDB's requests. Thus, we do not consider whether to grant IDB authority to provide international LMSS via any other facilities or service types (*e.g.* Inmarsat Third Generation satellites, *Communications Satellite Corp.*, 7 FCC Rcd 6278 (1992)).

4. IDB's applications appear to encompass not only international LMSS, but also service to international land-based temporary fixed-satellite earth stations operating in the LMSS frequency bands authorized herein. Although this latter service is a fixed-satellite service, and not a land mobile-satellite service, we believe it is comparable in many ways to a land mobile-satellite service. Given these circumstances, we find it is administratively efficient to address international land-based temporary fixed-satellite service in this proceeding. Thus, any findings we make in regard to international land mobile-satellite terminals and services apply equally to international temporary fixed-satellite terminals and services operating outside of North America.

5. IDB states that land mobile-satellite terminals which may be needed to support voice services, from time to time, will utilize directive antennas in order to conserve satellite resources and protect link margins on the maritime mobile-satellite services (MMSS) operating in the band. IDB states it is cognizant of its statutory mandate to serve maritime commercial, safety and distress needs, and recognizes that serving those needs remains its first priority. IDB states that it will make its best efforts to assure that Global Maritime Distress and Safety System (GMDSS) calls receive priority over any LMSS communications.

## II. DISCUSSION

6. The Commission recently authorized Comsat to provide international LMSS.[8] In so doing, the Commission determined that it has the authority consistent with the Inmarsat Convention and Operating Agreement to authorize U.S. participation in land mobile-satellite services via Inmarsat.[9] The Commission also determined that allowing U.S. companies to provide international LMSS is in the public interest.[10] Therefore, we need only consider here whether IDB's proposed offering of international LMSS is consistent with the guidelines the Commission established in granting Comsat's international LMSS application.

7. IDB's application to provide international LMSS mirrors the application Comsat had filed for these services. Like Comsat, IDB requests authority to serve only those mobile-satellite terminals in foreign points outside of North America reached by the Inmarsat System. IDB will use only the First and Second Generation satellites of the Inmarsat System. Further, IDB will maintain as its first priority serving maritime commercial, safety and distress needs. Therefore, we find that grant of IDB's application would be consistent with Commission precedent.

8. In addition, as the Commission found with Comsat, the provision of international LMSS by IDB would be within the public interest. IDB already is authorized to provide MMSS and aeronautical mobile-satellite services (AMSS). By granting IDB's applications, IDB will be able to offer the full panoply of mobile satellite service offerings. This will enhance U.S. competitiveness in foreign markets enabling IDB to compete effectively with Comsat and foreign signatories, who already are able to offer their customers full-service, integrated mobile satellite service offerings. IDB will now be able to spread its capital costs over its LMSS, as well as the MMSS and AMSS offerings, leading to greater utilization of expensive earth station facilities and therefore, lower per-message costs. Further, IDB's provision of international LMSS in foreign countries will enable its users with combined maritime and terrestrial communications needs to achieve substantial economies by utilizing an integrated communications system and similar mobile-satellite terminals to satisfy those needs.[11]

## III. CONCLUSION

9. We find that grant of these applications is fully consistent with Commission precedent. IDB's provision of international LMSS complies with U.S. obligations under the Inmarsat Convention and Operating Agreement. Further, we find this grant will advance U.S. competitiveness in world markets. Therefore, we conclude the grant of IDB's applications will serve the public interest, convenience and necessity.

10. Thus, IDB is authorized to provide land mobile-satellite services within and between foreign countries (excluding Canada and Mexico) and between fixed land earth stations in the United States, the Netherlands, and Australia and mobile-satellite terminals located outside of North America. IDB does not request

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states these LESs will transmit to Inmarsat Second Generation satellites on 6425-6440 MHz and receive on 3600-3620 MHz. Inmarsat First Generation satellites will only be used as backups to the Second Generation satellites. Due to operational constraints associated with the Inmarsat First Generation satellites (these satellites are only capable of supporting 7.5 MHz of these frequency bands), these LESs will transmit on 6417.5-6425 MHz and receive on 4192.5-4200 MHz when operating with these satellites. IDB states the international land mobile-satellite terminals to which it will provide service will communicate in the transmit frequency bands 1626.5-1645.5 MHz and the receive frequency bands 1530-1544 MHz for the mobile-to-satellite and satellite-to-mobile links of its international land mobile-satellite services. In accordance with the priority and pre-emption requirements of the GMDSS, the bands 1544-1545 MHz (receive) and 1645.5-1646.5 MHz (transmit) will only be used for maritime safety and distress communications.

[8] *Communications Satellite Corporation*, FCC 93-21, released January 27, 1993.

[9] *Id.* at ¶ 13.

[10] *Id.* at ¶ ¶ 20-23.

[11] Due to technical similarities between MMSS terminals and (voice) LMSS terminals, Inmarsat is able to allocate its space segment resources efficiently to accommodate multiple applications, yielding the economies and efficiencies that multipurpose systems afford. IDB will use the same Inmarsat space segment and the same land earth station facilities and internationally allocated spectrum to provide these international land mobile services, and users will operate similar terminals to send and receive communications.

and, we do not here grant, authority to provide land mobile-satellite services to or from mobile-satellite terminals located in North America as defined herein.

## IV. ORDERING CLAUSES

11. Upon consideration of the above-captioned applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of certain international land mobile-satellite and land-based temporary fixed-satellite services by IDB Aero-Nautical Communications, Inc.

12. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Sections 503 and 504 of the International Maritime Satellite Act of 1978, 47 U.S.C. §§ 752 and 753, applications File Nos. I-T-C-92-058 and I-T-C-92-059 ARE GRANTED and IDB Aero-Nautical Communications, Inc. IS AUTHORIZED to provide international land mobile-satellite and land-based temporary fixed-satellite services within and between foreign countries, excluding Canada and Mexico,[12] and between fixed land earth stations in the United States and Australia and mobile-satellite terminals in foreign points outside of North America (as defined herein at note 2). These services are to be provided in: 1) the Atlantic Ocean Region-East via Southwest Communications, Inc.'s authorized fixed land earth station at Staten Island, New York (call sign KA-227); 2) the Atlantic Ocean Region-West and Pacific Ocean Region via Southwest Communications, Inc.'s authorized fixed land earth stations at Niles Canyon, California (call signs KA-63 and KA-76, respectively); and 3) the Indian Ocean Region via OTC Limited of Australia's foreign fixed land earth station at Perth, Australia.

13. IT IS FURTHER ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Sections 503 and 504 of the International Maritime Satellite Act of 1978, 47 U.S.C. §§ 752 and 753, and subject to the limitations contained in paragraph 12 herein, the deferred sections of applications File Nos. I-T-C-93-013 and I-T-C-93-014 ARE GRANTED and IDB Aero-Nautical Communications, Inc. IS AUTHORIZED to provide Inmarsat Standard-C international land mobile-satellite services in: 1) the ship-to-shore direction in the Atlantic Ocean Region-East via PTT Telecom Netherlands' foreign fixed land earth station at Burum, the Netherlands; 2) the ship-to-shore direction in the Pacific Ocean Region via the Perth, Australia foreign fixed land earth station; 3) the ship-to-shore direction in the Atlantic Ocean Region-West via Comsat's fixed land earth station at Southbury, Connecticut, and 4) the ship-to-shore and shore-to-ship directions in the Indian Ocean Region via OTC Limited of Australia's foreign fixed land earth station at Perth, Australia. IDB also is authorized to provide Inmarsat Standard-C international land-based temporary fixed-satellite services in the Indian Ocean Region via the Perth, Australia foreign fixed land earth station.

14. IT IS FURTHER ORDERED that IDB is authorized to provide international LMSS and land-based temporary fixed-satellite services only within the frequency bands specified below which are consistent with the U.S. allocation for maritime services. Thus, IDB shall serve only those land mobile-satellite and land-based temporary fixed-satellite terminals communicating in the transmit frequency band 1626.5-1645.5 MHz and the receive frequency band 1530-1544 MHz for the mobile-to-satellite and satellite-to-mobile links of its international land mobile-satellite services. In addition, users of this service shall obtain the appropriate license or other authorization from the local telecommunications authority of the country in which the terminal will be used and any necessary licenses or authorizations from Agencies or Departments of the United States government (such as Treasury or Commerce). Thus, this authorization shall not be construed as providing domestic uplink or downlink authority within countries outside of the United States.

15. IT IS FURTHER ORDERED that IDB shall provide international LMSS via SCI's and Comsat's fixed land earth stations only if these earth stations have been authorized to provide this service, and are transmitting via the Inmarsat Second Generation satellites on 6425-6440 MHz and receiving on 3600-3620 MHz. IDB may also use these land earth stations when they are providing land mobile-satellite service via Inmarsat First Generation satellites transmitting on 6417.5-6425 MHz and receiving on 4192.5-4200 MHz, but only when these satellites are being used as backups to the Second Generation satellites.

16. IT IS FURTHER ORDERED that this broad authority does not cover the provision of international land mobile-satellite services or land-based temporary fixed-satellite services via any new land earth stations or Inmarsat satellites or cover any land mobile-satellite services not specifically authorized herein.

17. IT IS FURTHER ORDERED that this authorization is conditioned upon completion of the consultation(s) required by Article XIV(d) of the Intelsat Agreement to ensure technical compatibility and to avoid significant economic harm. In addition, IDB shall maintain as its first priority the service of maritime commercial, safety and distress needs, and in particular uphold the safety and distress requirements of the Global Maritime Distress and Safety System.

18. IT IS FURTHER ORDERED that IDB will be classified as dominant in the provision of the services authorized herein.

19. IT IS FURTHER ORDERED that, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, Part 61 of the Commission's Rules, 47 C.F.R. Part 61, and Section 504 of the Inmarsat Act, 47 U.S.C. § 754, IDB shall file such amendments to current tariffs with the Commission consistent with this decision. IDB also shall file, within 90 days of the release of this Order, a complete description of its accounting system and cost allocation procedures.

20. IT IS FURTHER ORDERED that IDB shall file copies of any operating agreements entered into by itself or its parent/affiliates with its correspondents within 30 days of their execution.

[12] Service also shall be excluded to countries for which the United States has an embargo on telecommunications.

21. IT IS FURTHER ORDERED that IDB shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and all international points it is authorized to serve within 90 days from the end of each calendar quarter.

22. IT IS FURTHER ORDERED that IDB shall file with the Commission every six months a letter reporting Inmarsat's progress in developing a means of distinguishing between maritime, aeronautical, and land mobile-satellite transmissions to allow for the primacy of maritime services and compliance with Commission Regulations and Rules regarding the use of these bands.

23. The Commission retains jurisdiction over this matter to ensure the nondiscriminatory use of, and equitable access to, the Inmarsat satellite system.

24. This order is issued under § 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under §1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 9, 1993**

**PETITION FOR DECLARATORY RULING FILED TO UNBUNDLE CORRECTIONAL INSTITUTION PAYPHONES RM-8181**

On February 2, 1992 the Inmate Calling Services Providers Task Force of the American Public Communications Council (Petitioner) filed a petition for a declaratory ruling that specialized phones for inmate-only services offered by local exchange carriers (LECs) are customer premises equipment (CPE), and that certain of the specialized inmate-only services offered by LECs are enhanced services (RM-8181). Petitioner asserts that these telephone systems should be provided on an unregulated basis, subject to the safeguards in the Commission's Rules and Orders governing provision of CPE.

Copies of the petition, and comments when filed, may be inspected and copied at the Commission's Reference Center, Room 239, 1919 M St., N.W., Washington, D.C. from 9:00 a.m. to 4:30 p.m. Copies are also available from ITS, INC., Room 246, 1919 M St., N.W. Washington, D.C. (202)857-3800. Comments regarding the petition may be filed on or before **March 8, 1993**. Reply Comments are due by **March 26, 1993**. Comments should reference RM-8181 and should be sent to: Donna R. Searcy, Secretary, Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202)632-7000. For further information contact Olga Madruga-Forti (202)634-1832.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of the Application of

Stephen Communications, Inc. — File No. 13596-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Lancaster, Pennsylvania

**ORDER ON RECONSIDERATION**

**Adopted: February 1, 1993; Released: February 16, 1993**

By the Chief, Domestic Facilities Division:

1. *Introduction.* Stephen Communications, Inc. (Stephen) requests reinstatement of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Lancaster, Pennsylvania, after its dismissal by the Domestic Facilities Division (Division) on delegated authority.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Stephen was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Stephen was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In this deficiency letter, Stephen was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Stephen provided some, but not all, of the information necessary to complete processing of its application. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d), the Division dismissed Stephen's application for failure to comply completely in a timely manner with the Division's request for information. With its reinstatement request, Stephen resubmitted a partial response to the Division's previous request for information, together with an affidavit stating that this information had been submitted prior to dismissal.

4. *Discussion.* As of the date of the Division's dismissal action, Stephen still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Stephen had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by Section 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. In addition, Stephen failed to submit the requested current financial qualification data prior to dismissal.[4] *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Instead, Stephen submitted a bank letter it obtained at the time it filed its initial application. However, at that time, Section 21.17(e) required that a bank financing letter must include a statement committing the bank to providing the financing. Stephen's letter lacks such a commitment because financing is contingent upon Stephen meeting credit criteria at an unspecified future date, with the credit criteria to be determined in the future. Thus, Stephen's bank letter submission failed to comply with Section 21.17 requirements and the Division's specific request.

6. Stephen also failed to comply with the request to submit a Section 21.902(i) ITFS interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed

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[1] The deficiencies cited were the absence of: (1) a public interest statement, pursuant to 21.13(a)(4); (2) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (3) a Federal Aviation Administration (FAA) compliance information, required by 47 C.F.R. Secs. 17.4 and 21.15(d); (4) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (5) the analysis of interference avoidance, required by 47 C.F.R. Sec. 21.901(d)(7); (6) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (7) the required tariff exhibit, pursuant to item 29 of FCC Form 435 and 47 C.F.R. Sec. 21.13(a)(3); (8) required information on station maintenance and emergency repairs, pursuant to 47 C.F.R. Sec. 21.15(e) and FCC Form 435 item 18; (9) answers to each of the questions on pages 5, 6 and 7 of the application, FCC Form 435; and (10) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Stephen was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*).

[4] Even if Stephen were not required to comply with the requirements of Section 21.17, Stephen was required, pursuant to Section 21.13(c), to submit in a timely manner the required financial demonstration after the Division directed it to do so.

transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Stephen failed to do so. *See Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

7. Stephen had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for approximately 15 months substantially impeded the expeditious offering of MMDS at Lancaster. Also, Stephen's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Stephen had not provided the required current financial data, the required ITFS interference analysis, or the required lease or lease option agreement. The Division was not in a position, therefore, to complete evaluation of Stephen's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

8. *Conclusion.* Having carefully considered the applicant's reinstatement request, we find that dismissal of this application for failure to comply with the Division's request for information was proper and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the request for reinstatement filed by Stephen Communications, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of the Application of

Local Service Television, Inc. — File No. 7345-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Dothan, Alabama

**ORDER ON RECONSIDERATION**

**Adopted: February 1, 1993; Released: February 16, 1993**

By the Chief, Domestic Facilities Division:

1. *Introduction.* Local Service Television, Inc. (Local) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Dothan, Alabama, and requested reinstatement of its application. For the reasons discussed below, we deny the petition.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Local was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Local was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In this deficiency letter, Local was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Local provided none of the information necessary to complete processing of its application prior to dismissal. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d), the Division dismissed Local's application for failure to comply completely in a timely manner with the Division's request for information. On reconsideration, Local states that through inadvertence no extension request was filed, but argues that its application should be reinstated because if an extension had been requested, it would have been granted. Local also submitted a partial response to the Division's previous request for information.

4. *Discussion.* As of the date of the Division's dismissal action, Local still had not submitted the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Local failed to submit the requested current financial qualification data prior to dismissal.[2] *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

5. In addition, Local failed to submit prior to dismissal the requested FAA study for compliance with FCC and FAA regulations concerning avoidance of air navigation hazards, pursuant to Sections 17.4 and 21.15(d). Also, Local failed to submit tariff, maintenance, carrier frequencies, non-affiliation, and station equipment information. Thus, Local failed to comply with Sections 21.13, 21.15, 21.900, and 21.903 requirements and the Division's specific request.

6. Local also failed to comply with the request to submit a Section 21.902(i) ITFS interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS analysis at such time as the Commission requests it.[3] Despite the specific request that this analysis be submitted by a specified date, Local failed to do so. *See Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

7. Local had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more than six (6) months

[1] The deficiencies cited were the absence of: (1) required carrier frequencies data in MHz on which transmitters would operate, pursuant to item 6(a) of FCC Form 435 and 47 C.F.R. Sec. 21.13(a)(3); (2) a Federal Aviation Administration (FAA) study, as required by 47 C.F.R. Secs. 17.4 and 21.15(d); (3) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (4) the description of program input facilities and studio equipment pursuant to item 17 of FCC Form 435 and 47 C.F.R. Secs. 21.13(a) and 21.903; (5) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (6) complete information for the required tariff exhibit, pursuant to item 29 of FCC Form 435 and 47 C.F.R. Sec. 21.13(a)(3); (7) required information on station maintenance and emergency repairs, pursuant to 47 C.F.R. Sec. 21.15(e) and item 18 of FCC Form 435; and (8) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Local was not required to comply with the requirements of Section 21.17, it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit current financial data after the Division directed it to do so. Section 21.13(a) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] Even if Local was not required to comply with the requirements of Section 21.901(d)(2), it was required, pursuant to Section 21.13(c), to submit in a timely manner the required interference analysis after the Division directed it to do so.

substantially impeded the expeditious offering of MMDS at Dothan. *Radio Telephone Service, Inc.*, 63 FCC 2d 1126 (1977). Also, Local's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Local had not provided the required current financial data, the required ITFS interference analysis, the required FAA study, required tariff data, required maintenance plan, required technical carrier frequencies specification, required non-affiliation statement, or required station equipment information. The Division was not in a position, therefore, to complete evaluation of Local's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

8. *Conclusion.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's request for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the reconsideration petition filed by Local Service Television, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**

**Released: February 9, 1993**

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Berkeley Cable Communications
P.O. Box 789
Falling Waters, West Virginia 25419

In re: Berkeley Cable Communications
Berkeley County, West Virginia
WV1093

Dear Cable Operator:

This is a Notice of Apparent Liability for forfeiture issued pursuant to §503(b) of the Communications Act of 1934, as amended. Berkeley Cable Communications (hereinafter Berkeley) has incurred liability in the amount of $23,750 based on the following apparent repeated violations of the Commission's Rules:

> Emission of radiation in excess of twenty (20) microvolts per meter measured at a distance of ten feet from the cable on February 12, 1992 and February 14, 1992, in violation of §76.605(a)(11) of the Commission's Rules.

Section 76.605(a)(11) of the Commission's Rules prohibits cable systems, operating in the 54-216 MHz band, from radiating in excess of 20 microvolts per meter at a distance of ten (10) feet from the cable. It is apparent from the severity and number of leaks found, that Berkeley has extensive leakage problems (see Appendix I). Under the Commission's regulatory framework, a cable system's use of the spectrum is dependent upon its ability to control signal leakage. Cable operators transmit signals by coaxial cable and should not radiate signals in excess of the standards set out in the Commission's Rules. This allows cable television systems and authorized over-the-air users to use the same frequencies in the same area. To do so, systems must meet stringent Commission radiation standards to ensure that their use of frequencies in the coaxial cable will not interfere with proximate authorized over-the-air services. Where aeronautical frequencies are involved, the need for cable signal integrity is vital. The Commission has repeatedly expressed its concern over the danger that exists to life and property from cable systems, such as Berkeley's, that radiate excessively. *Second Report and Order in Docket 21006*, 99 FCC 2d 512 (1984); *recon. denied*, 100 FCC 2d 117 (1985); *Report and Order in Docket No. 21006*, 65 FCC 2d 813 (1977).

On February 12 and 14, 1992, staff from the Commission's Field Operations Bureau at Baltimore, Maryland inspected Berkeley's cable system serving Berkeley County, West Virginia. It was discovered that on both days, the system was emitting signal leakage in excess of the Commission's signal leakage standard and thus in violation of §76.605 of the Rules. Additionally, based upon the magnitude of the emissions detected on February 12, 1992, it was also determined that the system's operation constituted a threat to aeronautical communications. In this regard, the Commission has indicated that a cable system operating with an ambient signal leakage level exceeding the Cumulative Signal Leakage Index (CLI) criteria set forth in §76.611 of the Rules, such as Berkeley's, endangers the functioning of the radionavigation service or aeronautical communications.[1] See *Second Report and Order in Docket No. 21006, supra*, at 524. Accordingly, Berkeley was directed by the Field Operations Bureau to cease operations in the frequency bands 108-137 MHz and 225-400 MHz because such endangerment constitutes harmful interference as defined by §76.613 of the Rules. Berkeley complied by curtailing service in the relevant frequency bands.

Based upon the above facts, it appears that the Berkeley system has been radiating in excess of the Commission's standards and that this noncompliance threatened the Commission's regulatory goal of compatibility between the use of frequencies by cable television systems and various services in the same area, and was a serious threat to public safety. We note that Berkeley complied immediately with the staff's directive and has now eliminated the cited excessive signal leakage. However, such corrective action does not excuse Berkeley's initial failure to maintain the integrity of its cable distribution plant or relieve it of liability for such dereliction. In determining the amount of a forfeiture, we are guided by the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), which takes into consideration the factors set forth in §503(b)(2) of the Communications Act of 1934, as amended. Under these standards, $12,500 is the base forfeiture for unauthorized signal leakage. Here, the leakage measured on the first day was severe and, in fact, exceeded the CLI criteria. In addition, a serious leakage problem in violation of §76.605 was discovered on the second day of inspection. Because of the serious threat to the public safety caused by such operation, we find the level of the initial signal leakage violation to be a substantial aggravating factor. *See TCI Cablevision of Maryland*, 6 FCC Rcd 6487 (1991). Consequently, because the violation was egregious, applying the standards, we are increasing the forfeiture to $23,750.

In regard to this forfeiture, Berkeley may take any of the actions set forth in §1.80 of the Commission's Rules, as summarized in the attachment to this letter.

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[1] The provisions of §76.611 are applicable to all cable television systems which transmit carriers or other signal components carried at an average power level equal to or greater than $10^{-4}$ watts across a 25 MHZ bandwidth in any 160 microsecond period, at any point in the cable distribution system in the frequency bands 108-137 and 225-400 MHZ for any purpose. Berkeley's signal use satisfies these conditions.

This letter was adopted by the Commission on February 5, 1993.

BY DIRECTION OF THE COMMISSION*

Donna R. Searcy
Secretary

* Commissioner Marshall not participating.

**APPENDIX I**

**BERKELEY CABLE COMMUNICATIONS**

| DATE | LOCATION | MICROVOLTS/ METER |
|---|---|---|
| 2/12/92 | Rt. 11, 3rd pole N of Downey Orchard Road | 1140 |
| 2/12/92 | Rt. 11 at Kave's Used Auto Parts | 954.2 |
| 2/12/92 | Downey Orchard Rd., 1st pedestal on right (fresh digging) | 413.5 |
| 2/12/92 | Downey Orchard Rd. at Potomac Park Estates | 291 |
| 2/12/92 | Broad Lane at Eagle Apts. | 4215.7 |
| 2/12/92 | Rt. 11 at Hensell Heights | 888.8 |
| 2/14/92 | Rt. 38 South of Rt. 45 | 746.9 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Eagletron Telecommunications, Ltd., Tsuen Wan, Hong Kong — NAL/Acct. No.: 215HF0012

**ORDER**

**Adopted: February 10, 1993; Released: February 17, 1993**

By the Field Operations Bureau:

## I. INTRODUCTION

1. This is a Forfeiture Order issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to Eagletron Telecommunications, Ltd. (Eagletron) for willful violation of Section 302(b) of the Communications Act, 47 U.S.C. § 302(b) and Sections 2.931 and 2.1043(a)(incorporating former Sections 15.118(c) and (d) of the Commission's Rules which were in effect when this equipment was authorized), 47 C.F.R. §§ 2.931 & 2.1043(a), and Sections 15.201(b) and 15.209(a) of the Rules, 47 C.F.R. §§ 15.201(b) & 15.209(a).

2. The forfeiture for this violation is cancelled.

## II. BACKGROUND

3. On August 24, 1992, the Commission released a Notice of Apparent Liability for Monetary Forfeiture to Eagletron for marketing devices which did not conform to the original grant of authorization.

4. On September 14, 1992, Eagletron responded by letter admitting that they had marketed devices in violation of the rules due to an improperly calibrated test instrument, but that they had detected and corrected the problem themselves. They assert that the devices purchased by the Commission were those shipped from the factory prior to Eagletron becoming aware of the problem. Eagletron asserts, because of this, the violation was not willful.

## III. DISCUSSION

5. Eagletron Telecommunications, Ltd., has violated Section 302(b) of the Communications Act by marketing a baby monitor which does not conform to the equipment authorization and could not be certified.

6. The violation was willful. The marketing of the device was the necessary willful act. It is not necessary to find that Eagletron intentionally violated the requirement.

7. We note, however, that the Notice of Apparent Liability was released more than one year after the date of violation.

## IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that the proposed forfeiture to Eagletron Telecommunications, Ltd., IS CANCELLED.

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Eagletron Telecommunications, Ltd., Mappin House 22/F, 98 Texaco Road, Tsuen Wan, Hong Kong.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Fisher Price Division NAL/Acct. No.: 215HF0013
of the Quaker Oats Company
East Aurora, New York

**ORDER**

**Adopted: February 10, 1993; Released: February 17, 1993**

By the Field Operations Bureau:

## I. INTRODUCTION

1. This is a Forfeiture Order issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to the Fisher-Price Division of the Quaker Oats Company (Fisher Price) for willful violation of Section 302(b) of the Communications Act, 47 U.S.C. § 302(b) and Sections 2.803 and 15.101 of the Rules, 47 C.F.R. §§ 2.803 & 15.101.

2. The forfeiture for this violation is cancelled.

## II. BACKGROUND

3. On August 24, 1992, the Commission released a Notice of Apparent Liability to Monetary Forfeiture to Fisher-Price for marketing equipment without authorization.

4. On September 11, 1992, Fisher-Price responded by letter stating that the receiver at issue had received authorization in a grant to its original manufacturer and supplier to Fisher-Price, but that when Fisher-Price began production it did not apply for a new grant for the receiver it manufactured.

## III. DISCUSSION

5. Fisher Price has violated Section 302(b) of the Communications Act and Section 2.803 of the Rules by marketing a baby monitor receiver which has not received an equipment authorization grant. Fisher-Price should have obtained an authorization when it began to manufacture the receiver.

6. The violation is willful.

7. We note, however, that the Notice of Apparent Liability was released more than one year after the date of violation.

## IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that the proposed monetary forfeiture to Fisher Price IS CANCELLED.

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Monetary Forfeiture shall be sent to Paul A. Mitchell, Fisher-Price, Inc., 636 Girard Avenue, East Aurora, New York 14052-1885.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-36**

In the matter of

STARETT MEDIA CORP.

Licensee of Station WFRK(AM)
Coleman, Florida

Order to Show Cause Why the
License for Station WFRK(AM)
Coleman, Florida, Should Not
be Revoked

**ORDER**

**Adopted: January 7, 1993; Released: February 17, 1993**

By the Chief Mass Media Bureau:

1. This proceeding began on March 26, 1992, when the Commission released its *Order to Show Cause and Hearing Designation Order*, 7 FCC Rcd 2122 (1992)(*OSC*). The Commission ordered Starett Media Corp. (hereinafter, "Starett") to show cause why the license for WFRK(AM), Coleman, Florida, should not be revoked.[1] The Commission specified an issue to determine whether Starett has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.[2] The Commission also specified an issue to determine whether, in light of the evidence adduced, Starett possesses the requisite qualifications to remain a Commission licensee. By *Order*, FCC 92M-622, released May 29, 1992, Presiding Administrative Law Judge Joseph P. Gonzalez terminated the hearing proceeding because Starett failed to file the requisite notice of appearance. Pursuant to Section 1.92 of the Commission's Rules, the Judge also certified the case to the Commission.

2. The Commission's records indicate that WFRK(AM) has been off the air without authority since October 14, 1989. Attempts to communicate with Starett have proved fruitless. All correspondence, including the *OSC* directed to Starett's last known address have been returned by the U.S. Postal Service as undeliverable. In light of the foregoing, we conclude that Starett has violated Sections 73.1740 and 1.7350 of the Commission's Rules and that Starett is not qualified to remain the licensee of Station WFRK(AM).

3. Accordingly, IT IS ORDERED, that the licensee of Starett Media Corporation for WFRK(AM), Coleman, Florida is revoked.[3]

4. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Although the Commission included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, no forfeiture is being imposed because of the action taken herein.

[2] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

[3] The Mass Media Bureau has been given delegated authority to issue revocation orders in silent station cases. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 90-77**

In the Matter of

AT&T Communications
Tariff F.C.C. No. 1

Software Defined Network Promotional Offering — Transmittal No. 1922

**ORDER**

**Adopted: December 23, 1992; Released: February 17, 1993**

By the Commission:

1. In November 1989, AT&T Communications (AT&T) filed Transmittal No. 1922 as a promotional offering for one of its Software Defined Network (SDN) plans. In February 1990, the Common Carrier Bureau (Bureau) suspended this transmittal,[1] and in April of that year designated issues for investigation.[2]

2. Under Transmittal 1922, customers for the SDN promotion receive a $450 credit against their service charges, for any customer location converted to SDN, provided that two conditions are satisfied. First, the customer must order service under SDN Expanded Volume Plan Part II within a certain time period. Second, the customer must demonstrate that it received a proposal from another interexchange carrier (IXC) for an SDN-like service which offered a credit to offset usage charges until the IXC's SDN-like service was installed. The Bureau's Order designated for investigation the issue of (1) whether Transmittal 1922 contained permissably vague language; and (2) whether the offering was unreasonably restrictive.

3. On October 18, 1991, AT&T filed Transmittal No. 3559 to eliminate from its Tariff F.C.C. No. 1 the provisions introduced by Transmittal 1922. According to AT&T, there are no customers who currently take the Transmittal 1922 promotion, and this promotion is no longer available to new customers. For this reason, AT&T chose to remove the promotion from its tariff.

4. In light of AT&T's withdrawal of the instant filing, we have determined that there is no further reason to continue the investigation of Transmittal 1922. Moreover, it is unlikely that these issues that we designated for investigation in this docket will recur in the context of similar SDN offerings.[3] We therefore have decided to terminate the investigation of AT&T Transmittal 1922 and to close CC Docket No. 90-77, established for this investigation.

5. Accordingly, IT IS ORDERED that the investigation of AT&T Transmittal No. 1922, established in CC Docket No. 90-77, IS TERMINATED and CC Docket No. 90-77 IS CLOSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] *See* AT&T Communications, Transmittal No. 1922, CC Docket No. 90-77, 5 FCC Rcd 1238 (Com.Car.Bur. 1990).
[2] *See* AT&T Communications, Transmittal No. 1922, CC Docket No. 90-77, 5 FCC Rcd 2532 (Com.Car.Bur. 1990).
[3] However, these issues are likely to recur in AT&T's Tariff 15 offerings. We continue to investigate these issues in that context. *See, e.g.*, AT&T Communications, Tariff F.C.C. No. 15, 7 FCC Rcd. 3036 (1992) (*Supplemental Designation Order and Stay*).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-16**

In the Matter of

Amendment of Section 73.202(b), RM-8163
Table of Allotments,
FM Broadcast Stations.
(Remington, Virginia)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: January 29, 1993; Released: February 17, 1993**

**Comment Date: April 12, 1993**
**Reply Comment Date: April 27, 1993**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Mountain Air Broadcasting ("petitioner"), requesting the allotment of Channel 283A to Remington, Virginia, as the community's first local FM service.[1] Petitioner states that it will apply for Channel 283A, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Petitioner states that Remington is an incorporated community with a 1990 U.S. Census population of 460 persons. However, we have been unable to confirm that Remington is included in the U.S. Census.[2] Therefore, the petitioner should present the Commission with further information to demonstrate that Remington has social, economic, cultural, and government indicia to qualify it as a "community" for allotment purposes.[3]

3. We believe the public interest would be served by seeking further information on the status of Remington as a community for allotment purposes, since the allotment of Channel 283A could provide the community with a first local FM service. Channel 283A can be allotted to Remington in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[4]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Remington, Virginia | -- | 283A |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 12, 1993,** and reply comments on or before **April 27, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Althea Bauers
Mountain Air Broadcasting
14458 Long Channel Circle
Germantown, Maryland 20874
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

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[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3910, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] Kurten is listed in the 1991 Rand McNally Commercial Atlas and attributed with a population of 460. However, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi*, 48 FR 5974 (1983); and *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991).

[3] *See, e.g., Gretna, et.al., FL*, 6 FCC Rcd 633 (1991); *Oak Grove, FL*, 5 FCC Rcd 3774 (1990); *Statenville, GA*, 5 FCC Rcd 2685 (1990); *East Hemet, et.al., CA*, 4 FCC Rcd 7895 (1989); and *Beaver Springs, PA*, 4 FCC Rcd 5373 (1989).

[4] The coordinates for Channel 283A at Remington are North Latitude 38-22-00 and West Longitude 77-48-42.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-17**

In the Matter of

Amendment of Section 73.202(b), RM-8170
Table of Allotments,
FM Broadcast Stations.
(Rosendale, New York)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: January 29, 1993; Released: February 17, 1993**

**Comment Date: April 12, 1993**
**Reply Comment Date: April 27, 1993**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by the State University of New York ("petitioner"), licensee of noncommercial educational Station WFNP, Channel 204A, Rosendale, New York. Petitioner requests the allotment of Channel 273A to Rosendale and the modification of Station WFNP's license to specify Channel 273A.

2. Petitioner states that Station WFNP is a share-time facility with Station WRHV, Channel 204B, Poughkeepsie, New York, and thus cannot operate fulltime on its present channel. In order to fulfill its desire to improve the service Station WFNP provides to Rosendale, petitioner requests that commercial Channel 273A be allotted to Rosendale and Station WFNP's license modified accordingly.

3. We believe the public interest would be served by proposing the allotment of Channel 273A to Rosendale and the modification of Station WFNP's license accordingly since it could enable full-time operation by the station and thereby improved service to Rosendale. We also propose to modify Station WFNP's license to specify operation on Channel 273A in lieu of its present Channel 204A. Because the petitioner is seeking modification to a channel of the same class, Station WFNP's license can be modified without providing an opportunity for competing expressions of interest. However, we note that should another party express an interest in providing Rosendale with an additional local service, Channel 255A is available for allotment. Channel 273A can be allotted to Rosendale in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.7 kilometers (2.9 miles) southeast to avoid a short-spacing to Station WUUU, Channel 273B, Rome, New York.[1] Canadian concurrence in the allotment at Rosendale is required since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Petitioner has not requested that Channel 273A be reserved for noncommercial educational use. In this regard, Commission policy generally does not permit the reservation of a commercial channel for noncommercial use except where channels in the reserved portion of the FM band (Channels 201-220) are not available due to TV Channel 6 interference or foreign use of the noncommercial educational band. While Rosendale is located within 320 kilometers (200 miles) of the U.S.-Canadian border, petitioner has not provided any information regarding the availability of channels in the reserved portion of the band. It is requested that the petitioner clarify whether it seeks to have Channel 273A allotted as a reserved or non-reserved channel. If it does wish to have Channel 273A reserved for noncommercial educational use, petitioner is requested to provide an appropriate showing demonstrating that channels within the reserved portion of the FM band are unavailable due to the proximity of a TV Channel 6 station and/or use of the channels by Canadian stations.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Rosendale, New York. | – | 273A |

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **April 12, 1993,** and reply comments on or before **April 27, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

| | |
|---|---|
| Mr. Lewis Rosenthal<br>State University<br>of New York<br>State University<br>Plaza<br>Albany, New York 12246<br>(Petitioner) | Kyle E. Magrill<br>Magrill<br>& Associates<br>P.O. Box 456<br>Orange Lake,<br>Florida 32681<br>(Consultant) |

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the*

[1] The coordinates for Channel 273A at Rosendale are North Latitude 41-49-14 and West Longitude 74-02-13.

*Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-18**

In the Matter of

Amendment of Section 73.202(b), RM-8173
Table of Allotments,
FM Broadcast Stations.
(Coos Bay, Oregon)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: January 29, 1993; Released: February 17, 1993**

**Comment Date: April 12, 1993**
**Reply Comment Date: April 27, 1993**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Kenton Sturdevant ("petitioner") requesting the allotment of Channel 271A to Coos Bay, Oregon, as the community's third local commercial FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 271A to Coos Bay since an interest has been expressed in providing the community with an additional local radio service. Channel 271A can be allotted to Coos Bay in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Coos Bay, Oregon | 254C2, 290C2 | 254C2, 271A, 290C2 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 12, 1993,** and reply comments on or before **April 27, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Kenton Sturdevant
295 E 41st
Eugene, Oregon 97405
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

### APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

[1] The coordinates for Channel 271A at Coos Bay are North Latitude 43-22-00 and West Longitude 124-12-54.

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-249**

In the Matter of

Amendment of Section 73.202(b), RM-8103
Table of Allotments,
FM Broadcast Stations.
(Proctor, Minnesota)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: January 29, 1993; Released: February 17, 1993**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 7563 (1992), issued in response to a petition filed by Frank P. Befera ("petitioner"). The *Notice* proposed the allotment of Channel 299A to Proctor, Minnesota, as that community's first local broadcast service. Petitioner filed comments reaffirming his interest in the allotment of Channel 299A at Proctor. No other comments were received.

2. We believe the public interest would be served by allotting Channel 299A to Proctor, Minnesota, as it will provide the community with its first local broadcast service. Channel 299A can be allotted to Proctor consistent with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Since Proctor is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 5, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Proctor, Minnesota | 299A |

4. The window period for filing applications will open on **April 6, 1993,** and close on **May 6, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

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[1] The coordinates for Channel 299A at Proctor are 46-44-42 and 92-13-54.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Extension of Filing Date for Annual
Report of Wire-Telegraph, Ocean-cable
and Radiotelegraph Carriers
(FCC Forms O/R)

**ORDER**

**Adopted: February 5, 1993; Released: February 9, 1993**

By the Chief, Industry Analysis Division:

1. Pursuant to Sections 1.785 and 43.21 of the Commission's Rules, wire-telegraph, ocean-cable and radiotelegraph carriers having annual revenues in excess of $50,000 are required to file FCC Form O/R with the Commission not later than March 31 of each year, covering the preceding calendar year.

2. Last summer, the Commission released a Notice of Proposed Rulemaking (Notice)[1] to eliminate Parts 34 and 35 of its Rules, which prescribe the uniform system of accounts for Wire-Telegraph, Ocean-Cable, and Radiotelegraph Carriers, and the related annual reports Form O and Form R. Additionally, the Notice proposed to amend Part 43 of the Rules to provide for the annual filing, by record carriers with annual operating revenues of over $100 million, of a letter showing operating revenues and the value of total communications plant. Comments and reply comments have been received in this proceeding but the Commission has not yet issued an order addressing these issues.

3. On January 14, 1993, New Valley Corporation (New Valley) filed a petition for waiver of Sections 1.785 and 43.21 of the Commission's Rules which require the filing of its Form O for the calendar year 1992 citing (1) the above Notice, (2) the heavy burden it would incur in preparing the Form O, and (3) the previous waivers granted by the Commission that eased this reporting burden. In their petition, New Valley proffered to file a letter setting forth its operating revenues and the value of its total communications plant for that year as proposed in the Notice even though New Valley would not be subject to this proposed requirement because of the $100 million annual threshold.

4. It has been the policy of the Commission to ease reporting burdens whenever possible. In that regard, we will extend the filing date for New Valley and all other companies required to file the Form O and Form R reports until the Commission acts in CC Docket No. 92-145, subject to the companies filing a letter setting forth their operating revenues and the value of their total communications plant for calendar year 1992. We anticipate that at the time the Commission acts in the above mentioned proceeding it should become clear if, and to what extent, further information or reports will be required for calendar year 1992 and beyond.

5. Accordingly, IT IS ORDERED, That pursuant to Sections 0.91(a), 0.291 and 1.3 of the Commission's Rules, an extension of the filing date for the 1992 Form O/R until the Commission acts in CC Docket 92-145 IS GRANTED for all wire-telegraph, ocean-cable and radiotelegraph carriers.

6. IT IS FURTHER ORDERED, That New Valley Corporation's petition for waiver for certain annual reporting requirements IS DENIED except to the extent stated above.

FEDERAL COMMUNICATIONS COMMISSION

Peyton L. Wynns, Chief
Industry Analysis Division
Common Carrier Bureau

[1] Elimination of Part 34, Uniform System of Accounts for Radiotelegraph Carriers, and Part 35, Uniform System of Accounts for Wire-Telegraph and Ocean-Cable Carriers, of the Commission's Rules and Regulations, and Elimination of Annual Reports Form R, for Radio-telegraph Carriers, and Form O, for Wire-Telegraph Carriers and Ocean-Cable Carriers and Amendment of Part 1 and Part 43 of the Commissions's Rules, *Notice of Proposed Rulemaking*, CC Docket No. 92-145, 7 FCC Rcd 4481 (1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-19**

In the Matter of

Amendment of Section 73.202(b), RM-8176
Table of Allotments,
FM Broadcast Stations.
(Kennett, Missouri)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: January 29, 1993; Released: February 17, 1993**

**Comment Date: April 12, 1993**
**Reply Comment Date: April 27, 1993**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by PM Broadcasting, Inc. ("petitioner") requesting the allotment of Channel 282A to Kennett, Missouri, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application if the channel is allotted to Kennett.

2. We believe petitioner's proposal warrants consideration. Channel 282A can be allotted to Kennett, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 10.9 kilometers (6.8 miles) northwest of the community.[1] The site restriction will prevent a short spacing to Station WTNV, Channel 281C1, Jackson, Tennessee, and to Station WRVR-FM, Channel 283C1, Memphis, Tennessee.

3. In view of the fact that the proposed allotment would provide an additional broadcast service to Kennett, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Kennett, Missouri | 255C | 282A, 255C |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 12, 1993,** and reply comments on or before **April 27, 1993** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John M. Pelkey
Haley, Bader & Potts
4350 North Fairfax Drive, Suite 900
Arlington, Virginia 22203-1633

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 282A at Kennett are 36-20-07 and 90-04-39.

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-192**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-7960 |
| Table of Allotments, | RM-8036 |
| FM Broadcast Stations. | |
| (Rochester and Walton, Indiana) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: January 29, 1993; Released: February 17, 1993**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 5486 (1992), issued in response to two separately filed mutually exclusive petitions for rule making. J. B. Ladd ("Ladd") requested the allotment of FM Channel 229A to Walton, Indiana, as that community's first local aural transmission service (RM-7960). Dowagiac Broadcasting Company, Inc. ("DBC"), licensee of Station WDOW-FM, Channel 221A, Dowagiac, Michigan, requested the substitution of Channel 229A for Channel 221A at Rochester, Indiana, and modification of the license for Station WROI(FM), Channel 221A, accordingly.[1] The Rochester substitution was requested to enable Station WDOW-FM to increase its facility to 6 kilowatts at Dowagiac.[2] Ladd filed supporting comments in response to the *Notice*. WROI filed joint comments in support of DBC's proposal. DBC filed comments and a counterproposal.[3] Ladd, WROI and DBC filed reply comments.[4] Late filed comments were filed on behalf of Focus Radio, Inc. ("Focus"), proposed assignee of Station WUBU(FM), Channel 292A, South Bend, Indiana.[5]

2. Ladd advocates that the proposal to allot Channel 229A to Walton, Indiana, will further the Commission's allotment priorities by providing that community with its first local aural transmission service, as opposed to an increase in coverage areas by Stations WROI(FM) and WDOW-FM, and therefore urges adoption of his proposal.

3. WROI comments that Station WROI(FM) is the only local aural transmission facility in Rochester (population 5,969),[6] which it states is the largest community located in Fulton County (population 18,840). Thus, WROI endorses DBC's proposal to allot Channel 229A to Rochester at Station WROI(FM)'s present site [7] to allow both stations to increase their coverage areas. Additionally, WROI advises that the 6kW power increase would enable it to provide service to a greater portion of Fulton County.[8]

4. Further, WROI maintains that while Walton (population 1,053) is devoid of local aural transmission service, the community receives aural service from nine nearby radio stations. Therefore, WROI urges that adoption of its proposal at Rochester should be preferred since it would enable Station WROI(FM) to provide improved service and expand its coverage area in Fulton County.

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[1] At the time this proposal was filed, Manitou Broadcasting Corporation ("Manitou") was the licensee of Station WROI(FM). An assignment of the license to Bair Communications, Inc. ("Bair") (File No. BALH-920716HR) was granted September 9, 1992, and consummated October 21, 1992. All references to pleadings filed on behalf of Station WROI(FM) will be identified as "WROI".

[2] The proposed substitution would also enable Station WROI(FM) to expand its coverage area at Rochester.

[3] DBC counterproposed the allotment of Channel 293A to Rochester. However, DBC's counterproposal is technically defective. Specifically, a staff analysis reveals that, calculated from Station WROI's present site, Channel 293A would be 7.2 kilometers (4.8 miles) short-spaced to Station WQLR(FM), Channel 293B, Kalamazoo, Michigan, at coordinates 42-28-32 and 85-29-22; 6.0 kilometers (3.7 miles) short-spaced to Station WLSN(FM), Channel 293B, Greenville, Ohio, at coordinates 40-08-49 and 84-36-36; and 2.5 kilometers (1.6 miles) short-spaced to Station WUBU(FM), Channel 292A, South Bend, Indiana, at coordinates 41-40-36 and 86-15-08. (We note that the construction permit issued for Station WUBU(FM) was granted pursuant to the provisions of § 73.215 of the Commission's Rules, which allows contour protection for short-spaced assignments.) Therefore, the proposed allotment of Channel 293A to Rochester would require that Station WROI(FM) not only change its channel but also relocate its transmitter to a non-short spaced site. Furthermore, DBC failed to supply the Commission with written consent to Station WROI's transmitter site relocation from either Manitou or Bair. Commission policy requires that written consent of a licensee or permittee be obtained before we will require an existing station to change transmitter site. *See Big Bear Lake, California*, 4 FCC Rcd 7505 (1989), and *Claremore, Oklahoma*, 3 FCC Rcd 4037 (1988). Therefore, DBC's counterproposal has not been accepted. In view of our determination, comments filed with respect to the counterproposal will not be considered.

[4] DBC's reply comments will be considered to the extent they support its original proposal to allot Channel 229A to Rochester and are moot insofar as they alternately endorse the requested allotment of Channel 293A to that community. *See* note 2, *supra*.

[5] Focus' comments, which were accompanied by a motion to accept, object to consideration of Channel 293A to Rochester, as set forth in DBC's comments. The Commission's Rules do not contemplate the filing of pleadings beyond the comment periods indicated in the *Notice*. In any event, since DBC's counterproposal has not been accepted, Focus' responsive comments are moot.

[6] Population figures cited herein are from the 1990 U.S. Census.

[7] WROI advises that it has filed a modification application (File No. BPH-921014IE) to correct a minor error in the coordinates and transmitter height for Station WROI(FM). According to WROI, the correct coordinates at its transmitter site are 41-03-14 and 86-16-12, and the true height of its transmitter is 249 feet (rather than 220 feet listed in its authorization). WROI asserts that while the corrected coordinates create no new short spacings, it will increase 0.24 kilometers to Station WDOW-FM, Dowagiac, Michigan, while decreasing 0.80 kilometers to Station WVSH(FM), Huntington, IN.

[8] WROI states that maximum operation on Channel 229A with 6 kW at its current height will enable it to achieve a 37% increase in coverage area within its 60 dBu contour (453 sq. mi. to 621 sq. mi.) WROI states that operation on Channel 229A with maximum facilities (6 kW at 100 meters HAAT) would result in an increase of 110% in its service area (from 453 sq.mi. to 953 sq. mi.).

5. WROI adds that the close proximity of Grissom Air Force Base to the reference site at Walton may hamper the selection of an appropriate transmitter site to accommodate Channel 229A at that community due to restrictive radio and aeronautical hazard control zones.

6. DBC's responsive comments argue that public interest considerations favor the proposed substitution of Channel 229A at Rochester since it would eliminate the existing "grandfathered" short-spacings between Station WROI(FM) and Station WDOW-FM, as well as between Station WROI(FM) and Station WVSH(FM), Channel 220A, Huntington, Indiana.[9] Additionally, DBC states that the Rochester substitution would eliminate a short-spacing between Station WDOW-FM and Station WKGH(FM), Channel 222A, Allegan, Michigan.[10]

7. In reply comments, WROI reiterates its support of DBC's initial proposal to allot Channel 229A to Rochester at Station WROI(FM)'s current site,[11] since it would result in an improved service to a relatively sparsely populated county with few radio services. WROI asserts that DBC's proposal to improve the facilities of Stations WROI(FM) and Station WDOW-FM represents a more efficient allotment plan than mechanically applying the Commission's allotment priorities favoring a first local aural transmission service at Walton. WROI states that its belief is premised also on the potential technical problems posed by Walton's close proximity to Grissom Air Force Base. WROI argues that its proposal should be favored because it will promptly implement its proposed service improvement to the relatively thinly populated Fulton County. WROI urges the Commission to adopt DBC's proposal rather than the proposal for a new allotment at Walton. WROI asserts that the Walton allotment would result in years of delay because it would require the opening of a filing window inviting the filing of multiple applications and a comparative hearing. Furthermore, WROI argues, Walton is a smaller community which currently receives a multiplicity of reception services and thus does not warrant its own local service.

8. Ladd responds that pursuant to the *Second Report and Order, supra*, the Commission created the 6 kilowatt Class A station on a selective basis in recognition that not all Class A stations could increase their power level due to grandfathered short spacings. Other Class A station requests to increase power require showings to demonstrate how an increase in a station's service area would benefit the public. Conversely, Ladd remarks that the Commission's allotment priorities, 90 FCC 2d 88 (1982), favor a first local service over a proposal to upgrade an existing facility, citing *Belvidere, New Jersey and Scranton, Pennsylvania*, 6 FCC Rcd 1333 (1991); *Lafayette, Tennessee*, 6 FCC Rcd 3289 (1991); and *Homerville, Lakeland and Statenville, Georgia*, 6 FCC Rcd 5801 (1991). While both Stations WROI(FM) and WDOW-FM could benefit from DBC's proposal, Ladd comments that it does not change the comparative analysis, citing *Northwye, et al., Missouri*, 7 FCC Rcd 1449 (1992).

9. Ladd also argues that, contrary to DBC's contention, the number of reception services in Walton would not be a relevant factor. First, DBC has not established the number of stations that actually cover Walton. Second, even if this showing were made, longstanding Commission policy says that reception services are no replacement for first local transmission service. *See Clinton, Louisiana*, 45 RR 2d 1587 (1979); *Westover and Grafton, West Virginia*, 46 Fed. Reg. 10737 (1981); and *Conklin, New York*, 5 FCC Rcd 1104 (1990).

10. In response to WROI's concern that the close proximity of a military base to Walton may impede the selection of a usable transmitter site for Channel 229A, Ladd submitted an engineering study indicating that there are other areas in which an antenna could be constructed consistent with the Commission's technical requirements.[12]

11. In an effort to resolve the conflicting requests, the staff performed a frequency analysis for Rochester and Walton. Our analysis reveals that there is no alternate Class A channel available as a first local service to Walton, and no alternate channel available to Rochester to accommodate DBC's modification proposal. Therefore, the proposals must be comparatively considered.

12. As indicated in the *Notice*, pursuant to the Commission's allotment priorities, a first local service is generally preferred over a proposal to upgrade an existing facility.[13] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982); *see also Benton, Arkansas*, 2 FCC Rcd 1963, 1965 (1987); and *Lafayette, Tennessee*, 6 FCC Rcd 3289 (1991). Neither the allotment of Channel 229A to Walton nor the requested increase in power by Station WROI(FM) to 6 kilowatts operation would provide any first or second fulltime aural service. The proposed allotment of Channel 229A to Walton triggers allotment priority 3 -- first local service, while the upgrade at Rochester constitutes an improved service under priority 4 -- other public interest factors. Moreover,

[9] As stated in the *Notice*, both WROI(FM) and WDOW-FM presently operate as grandfathered Class A stations. The distance between the authorized site for Station WROI(FM), Rochester, Indiana, at coordinates 41-03-02 and 86-15-39 and Station WDOW-FM, Dowagiac, Michigan, at coordinates 41-59-52 and 86-03-14 is 106.6 kilometers (66.2 miles) whereas 115 kilometers (185.1 miles) is required to accommodate DBC's desire to increase its facility to 6 kilowatts. The distance between WROI(FM) and Station WVSH(FM), Huntington, Indiana, at coordinates 40-53-32 and 85-30-38 is 65.6 kilometers (41 miles) whereas a minimum separation of 72 kilometers (45 miles) is required.

[10] The distance between Station WDOW-FM and Station WKGH(FM), at coordinates 42-34-52 and 85-45-17, is 69.3 kilometers (43.1 miles) whereas a minimum separation of 72 kilometers (115.9 miles) is required. Station WDOW-FM is also 2.1 kilometers (1.3 miles) short-spaced to an application for Channel 220A at Howe, Indiana, at coordinates 41-38-59 and 85-21-12 (see File No. BPED-910320MA). DBC would remedy those short-spacings by relocating its transmitter 4.8 kilometers (3 miles) southwest of Dowagiac at coordinates 41-56-29 and 86-07-40.

[11] WROI advises that by increasing its power to 4.3 kilowatts at its present site pursuant to the Commission's revised rules in the *Second Report and Order*, in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), *recon.* 6 FCC Rcd 3417 (1991), it could increase its service to approximately 8,850 additional people within its service area.

[12] Ladd states that according to his consulting engineer, Channel 229A can be allotted to Walton at sites ranging from a large area extending from the proposed Walton site coordinates, 4.8 kilometers (3 miles) west, to a location 15 kilometers (10 miles) northwest from the closest airport runway, from which a 70 dBu signal could be provided over the entire community.

[13] The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

although a 6 kilowatt operation by Station WROI(FM) at Rochester could enable it to expand its service in Fulton County, neither DBC nor WROI made a showing that the present population not receiving a 70 dBu signal from Station WROI(FM) is underserved. *See Belvidere, New Jersey, supra.* As a result of the above analysis, Walton is afforded the higher priority, and must be preferred over the Rochester proposal. *See Epworth and Dyersville, Iowa,* 7 FCC Rcd 106 (1992).

13. Despite the site availability concerns raised by WROI, we see no reason to question Ladd's representations of site availability. WROI provides no documentation from military officials or aeronautical consultants to substantiate WROI's concerns that the proximity of a military base may limit the availability of suitable sites to serve Walton. Additionally, Ladd submitted engineering information to support its suggestion that there are other sites available to accommodate Channel 229A at Walton in conformity with the Commission's Rules. Therefore, we find no justification to alter the original coordinates specified for the Walton proposal in the *Notice.*[14]

14. Moreover, although WROI asserts that Walton presently receives reception service from stations licensed to nearby communities, as Ladd correctly observes, the Commission has traditionally held that such service is not a substitute for local transmission service. *See Conklin, New York,* 5 FCC Rcd 1104 (1990), and cases cited therein.

15. With respect to WROI's power increase request, as Ladd observes, consistent with Commission policy expressed in the *Second Report and Order, supra,* although FM stations are encouraged to improve their service by selectively increasing power wherever possible, facility increase requests by grandfathered stations must demonstrate that such requests are in the public interest. *See* 47 CFR § 73.213(c). Elimination of the grandfathered short-spacings triggered by DBC's proposal[15] is indeed a public interest factor to be considered. However, the request to increase the power of Station WROI(FM) to 6 kW to enable it to expand its coverage area does not outweigh the greater public interest benefit that would result from providing Walton with its first local aural transmission service. *See Belvidere, New Jersey, supra.*

16. As indicated in the *Notice,* Channel 229A can be allotted to Walton in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (2) of the Commission's Rules with a site restriction 3.1 kilometers (2.0 miles) northeast[16] of the community to avoid a short-spacing to Station WKHY(FM), Channel 228A, Lafayette, Indiana.[17] Moreover, since Walton is located within 320 kilometers (199 miles) of the U.S.-Canadian border, concurrence of the Canadian government to the proposed allotment of Channel 229A at that community was received.

17. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 5, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

| City | Channel No. |
|---|---|
| Walton, Indiana | 229A |

18. IT IS FURTHER ORDERED, That the petition for rule making of Dowagiac Broadcasting Company requesting the substitution of Channel 229A for Channel 221A at Rochester, Indiana (RM-8036) IS DENIED.

19. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Dowagiac Broadcasting Company IS DISMISSED as moot.[18]

20. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by Certified Mail to the following:

Lawrence Roberts, Esq.
Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons & Topel, P.C.
1000 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20036
(Counsel for J. B. Ladd)

Leonard S. Joyce, Esq.
Blair, Joyce & Silva
1825 K Street, N.W.
Suite 510
Washington, D.C. 20006
(Counsel for Dowagiac Broadcasting Company, Inc.)

John D. Pellegrin, Esq.
Law Offices of John D. Pellegrin, Chartered
1140 Connecticut Ave., N.W.
Suite 606
Washington, D.C. 20036
(Counsel for Manitou Broadcasting Corporation and Bair Communications, Inc.)

[14] However, other sites conforming with the Commission's Rules may be specified for Channel 229A at the application level. *See Melbourne, Florida,* 5 FCC Rcd 1031 (1990).

[15] See notes 9 and 10, *supra.*

[16] Coordinates used for Channel 229A at Walton are 40-40-45 and 86-12-39.

[17] Coordinates at the licensed site of Station WKHY(FM) are 40-23-13 and 86-58-10.

[18] As stated in the *Notice,* the Rochester proposal was previously denied by staff letter on May 1, 1991. Dowagiac Broadcasting Company filed a petition for reconsideration of that action, which we treated as a petition for rule making in the context of this proceeding.

Lauren A. Colby, Esq.
Law Offices of Lauren A. Colby
10 East Fourth Street
P.O. Box 113
Frederick, MD 21701
(Counsel for Focus Radio, Inc.)

21 IT IS FURTHER ORDERED, That the window period for filing applications on Channel 229A at Walton will open on **April 6, 1993,** and will close on **May 6, 1993.**

22. For further information concerning the above, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

23. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 10, 1993

**AMERICAN PUBLIC COMMUNICATIONS COUNCIL FILES PETITION FOR DECLARATORY RULING REGARDING US WEST BLOCKING SERVICE AND REQUESTS TEMPORARY WAIVER OR SUSPENSION OF ACCESS CODE UNBLOCKING REQUIREMENT**
**File No. ENF-93-01**

**Comment Date: March 2, 1993**
**Reply Comment Date: March 12, 1993**

On February 1, 1993, the American Public Communications Council ("APCC"), on behalf of itself and its members that are served by US West Communications, Inc., filed a petition requesting a declaratory ruling and a temporary waiver or suspension of Section 64.704(c) of the Commission's rules, which requires call aggregators to unblock equal access ("10XXX") codes.

In its petition, APCC asks the Commission to declare that US West's practice regarding its international direct-dial blocking service is unlawful and inconsistent with its tariff. According to APCC, US West does not allow its customers to subscribe simultaneously to its international direct-dial blocking and other fraud protection services. APCC also requests a temporary waiver or suspension of Section 64.704(c) for payphones in US West territory until US West has implemented blocking and screening services that are available simultaneously for payphone lines.

Parties wishing to comment on this matter may do so not later than **March 2, 1993.** Reply comments may be filed not later than **March 12, 1993.** Parties should file an original and five (5) copies of any comments or reply comments with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Mail Stop 1170, Washington, D.C. 20554. All filings concerning this matter must refer to **File No. ENF-93-01.**

A copy of the APCC petition and any subsequently filed documents in this matter may be obtained from the International Transcription Service, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800, and at 1919 M Street, N.W., Room 246, Washington, D.C. 20554. The petition and any related documents are also available for inspection and copying in the Public Reference Room, Plaza Level, 1250 23rd Street, N.W., Washington, D.C. 20554.

For further information, contact Kurt Schroeder at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**

**Released: February 9, 1993**

Robert H. Castellano, Director
Federal Regulation
AT&T
Room 1119L2
Basking Ridge, NJ 07920

**Re: CC Docket No. 92-77, Phase I, Compliance Plan**

Dear Mr. Castellano:

On November 6, 1992, the Commission released a Report and Order and Request for Supplemental Comment in CC Docket No. 92-77, Phase I, in which AT&T was directed to educate its cardholders to check public phone notices and to use 0+ access only at public phones identified as presubscribed to AT&T, and to provide clear and accurate access code dialing instructions on every proprietary calling card issued. The Commission further required AT&T to make its 800 access number easier to use, and to submit its plan for implementation of this requirements within 30 days from the release of the Order. The Commission delegated to the Common Carrier Bureau the authority to review these materials and order any necessary changes in content.[1]

AT&T submitted to the Bureau initial drafts of the materials in its plan of compliance on November 23, 1992. The proposed plan itself was filed in Docket 92-77 on December 23, 1992, and later amended in certain respects by your *Ex Parte* letters to Ms. Donna Searcy dated January 28, 1993, and January 29, 1993.

We have reviewed AT&T's plan of compliance, as amended, and have determined that it complies with the requirements set forth in the *0+ Order*. The plan, as amended, is hereby approved. We order that AT&T fully accomplish implementation of its plan as proposed and modified.

This letter was adopted by the Bureau on February 4, 1993.

Sincerely,

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] In the Matter of Billed Party Preference for 0+ InterLATA Calls, Report and Order and Request for Supplemental Comment, CC Docket No. 92-77, Phase I, 7 FCC Rcd 7714 (1992) (*0+ Order*).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

NYNEX Telephone Companies
Tariff F.C.C. No. 1

Transmittal No. 127

**ORDER**

**Adopted: February 8, 1993; Released: February 11, 1993**

By the Deputy Chief (Policy), Common Carrier Bureau:

## I. INTRODUCTION

1. On October 22, 1992, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 127 introducing Enterprise Service,[1] proposing end-to-end DS0 service over fiber-optic transport facilities. According to NYNEX, Enterprise Service would include network management, monitoring and surveillance features, and would provide customers with a Single Point of Contact for these service management features. Transmittal 127 Description and Justification (D&J) at 4, 7. To provide Enterprise Service, NYNEX contends that it must provide multiplexing equipment on the customer's premises, and asserts that the service is within the "multiplexer exception" to the Commission's prohibition against the bundling of customer premises equipment with tariffed offerings. *Id.* at 21-27.

2. On November 6, 1992, Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject, or alternatively, to suspend and investigate. NYNEX filed its reply on November 16, 1992.

3. MFS argues that the information provided by NYNEX fails to demonstrate that the rates proposed for Enterprise Service recover costs. MFS Petition at 2-3. Specifically, MFS states that NYNEX fails to identify with specificity the cabling costs or other multiplexer costs beyond the slots and plug-ins associated with the service. *Id.* at 4. MFS further contends that the proposed nonrecurring charges are unreasonable on their face, particularly when compared with existing tariffed rates for similar services, and cannot be approved in the absence of detailed time and wage studies. *Id.* at 5-6. MFS also argues that the fixed channel mileage rates proposed are more than 74 percent below the fixed mileage charges for NYNEX's tariffed DDS service. *Id.* at 6. Next, MFS argues that, because Enterprise Service and currently tariffed NYNEX services are "like" service, the proposed rates are unreasonably discriminatory. Citing NYNEX's Digital Data Service, and DIGIPATH Digital Service II, MFS states that, because all digital and all-fiber services are already tariffed by NYNEX, the only functions that purportedly distinguish Enterprise Service are the service management functions. However, MFS argues that NYNEX does not explain why these functions may not be offered as separately-rated service options. *Id.* at 8.[2]

4. Concerning the cost issues raised by MFS, NYNEX states that the slot and plug-in costs include the cost allocation on a per slot basis of all the common equipment costs for a composite of multiplexers. The slot cost does not represent any of the common costs for the optical line terminating multiplexers. These common costs, which include cabling, power supplies, T1 cards, mounting shelves and control cards, are included in the loop costs. NYNEX Reply at 19-20. Second, the cited $47 value associated with the loop is only the cost associated with the circuit account located in the central office, and not the full cost of the loop, which includes the outside plant accounts. *Id.* at 20. Third, NYNEX states that the average costs are developed by using the weighted average of the costs of both existing and new facilities. *Id.*

5. With respect to MFS's objections to NYNEX's nonrecurring charges, NYNEX states that the installation of network equipment, such as optical line terminating multiplexers, multiplexers and riser cable is not a nonrecurring cost issue. Those costs are capitalized and recovered in recurring rates. Nonrecurring charges recover the costs associated with such things as service order, customer premises visits, and service installation and testing. *Id.* at 21. NYNEX asserts that the reason Enterprise Service fixed mileage rates are more than 74 percent below that for DDS is that DDS requires a D4 channel bank in the central office, the cost for which is assigned to channel mileage. The cost for the Enterprise Service multiplexers, which are deployed on customer premises, is assigned to channel termination. *Id.*

6. NYNEX then asserts that Enterprise Service is not "like" existing tariffed offerings; and the proposed rates are not discriminatory. NYNEX contends that Enterprise Service offers end-to-end DS0 service that is guaranteed to the customer to be provided over fiber-optic transmission facilities. NYNEX asserts that the Commission has recognized that customers may consider provisioning differences to be a "factor material to their procurement decisions". *Id.* at 22-23 citing *AT&T Communications Revisions to Tariff F.C.C. No. 12*, 6 FCC Rcd 7039, 7044, ¶ 28 (1991). In contrast, NYNEX argues, DIGIPATH does not guarantee that the service will be provided over fiber. *Id.* at 23. NYNEX states that only Fiber Based Channel Terminations service guarantees that service will be provided over fiber; however, that service, unlike Enterprise Service, is not an end-to-end service. *Id.* Second, NYNEX differentiates Enterprise Service as its only offering including the Single Point of Contact and Customer Specific Service Management features. *Id.*

7. Finally, NYNEX asserts that Enterprise Service is not offered in an unlawfully discriminatory manner. NYNEX argues that the Commission does not require a new service or technology to be deployed universally before it can be deployed at all. *Id.* at 24. NYNEX contends that Enterprise Service may be obtained form any customer's designated premises where fiber-optic facilities exist between the

[1] NYNEX initially filed its Enterprise Service tariff under Transmittal No. 91 on May 1, 1992. Transmittal 91 was subsequently withdrawn.

[2] MFS's arguments concerning the multiplexer exception are addressed in our Order of January 21, 1993 addressing this transmittal.

customer's designated premises and a properly equipped central office. In addition, NYNEX points out that special construction provisions apply. *Id.* at 25.

8. The Common Carrier Bureau has reviewed NYNEX Tr. 127 concerning MFS's arguments that the transmittal is unreasonably discriminatory and fails to provide adequate cost support. In light of the action taken in NYNEX Telephone Companies F.C.C. Tariff No. 1, Transmittal No. 127, released January 21, 1993, we conclude that MFS has presented no compelling argument that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

9. Accordingly, IT IS ORDERED that the petition to reject, or alternatively, to suspend and investigate NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 127, filed by Metropolitan Fiber Systems, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-20**

In the Matter of

Amendment of Section 73.202(b) RM-8177
Table of Allotments,
FM Broadcast Stations.
(Cheyenne, Wyoming)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: February 1, 1993; Released: February 18, 1993**

**Comment Date: April 12, 1993**
**Reply Comment Date: April 27, 1993**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jackalope Broadcasting ("petitioner"), proposing the allotment of Channel 285A at Cheyenne, Wyoming, as its fourth local FM transmission service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 285A at Cheyenne, Wyoming, since it could provide the community with its fourth local FM transmission service. An engineering analysis reveals that Channel 285A can be allotted to Cheyenne in compliance with the Commission's minimum distance separation requirements at city reference coordinates without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Cheyenne, Wyoming | 250C, 264C1,[2] 285A, 292C3 | 250C, 264C1, 285A, 292C3 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 12, 1993,** and reply comments on or before **April 27, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20554
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] The coordinates for Channel 285A at Cheyenne are North Latitude 41-08-18 and West Longitude 104-48-48.

[2] We note that the FM Table of Allotments erroneously reflects the allotment of Channel 265C1 in lieu of Channel 264C1 at Cheyenne, Wyoming. We will make the editorial change in the context of this proceeding. Since the correction is editorial in nature, a public notice and comment proceeding is unnecessary. *See* 5 USC 553(b)(A) and (B).

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-238**

In the Matter of

Amendment of Section 73.202(b), RM-8086
Table of Allotments,
FM Broadcast Stations.
(Amarillo, Texas)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: February 1, 1993; Released: February 18, 1993**

By the Chief, Allocations Branch:

1. At the request of KAEZ-FM, Inc. ("petitioner"), licensee of Station KAEZ-FM, Channel 289A, Amarillo, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7234 (1992), proposing the substitution of Channel 289C3 for Channel 289A at Amarillo, and modification of Station KAEZ-FM's authorization to specify operation on the higher powered channel. Petitioner filed comments supporting the allotment at Amarillo. No other comments were received.

2. We believe the public interest would be served by substituting Channel 289C3 for Channel 289A at Amarillo, since it could provide the community with an additional wide coverage area FM service. Channel 289C3 can be allotted to Amarillo in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station KAEZ-FM's license.[1] As proposed, we will also modify Station KAEZ-FM's authorization to specify operation on Channel 289C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 5, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Amarillo, Texas | 226C1, 231C, 245C1, 250C, 254C1, 259A, 265C1, 270C1, 275C1, 276A, 289C3 |

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of KAEZ-FM, Inc., for Station KAEZ-FM, Amarillo, Texas, IS MODIFIED to specify operation on Channel 289C3, in lieu of Channel 289A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KAEZ-FM, Inc., licensee of Station KAEZ-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 289C3 at Amarillo are North Latitude 35-12-28 and West Longitude 101-51-18.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-250**

In the Matter of

Amendment of Section 73.202(b), RM-8101
Table of Allotments,
FM Broadcast Stations.
(Thibodaux, Louisiana)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: February 1, 1993; Released: February 18, 1993**

By the Chief, Allocations Branch:

1. At the request of KXOR, Inc. ("petitioner"), licensee of Station KXOR-FM, Channel 292A, Thibodaux, Louisiana, the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7565 (1992), proposing the substitution of Channel 292C3 for Channel 292A at Thibodaux, and modification of Station KXOR-FM's license to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 292C3 for Channel 292A at Thibodaux, since it could enable Station KXOR-FM to expand its coverage area. Channel 292C3 can be allotted to Thibodaux in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.9 kilometers (12.4 miles) southwest to accommodate petitioner's desired site.[1] As proposed, we will also modify Station KXOR-FM's license to specify operation on Channel 292C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 5, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Thibodaux, Louisiana | 292C3 |

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of KXOR, Inc., for Station KXOR-FM, Thibodaux, Louisiana, IS MODIFIED to specify operation on Channel 292C3, in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KXOR, Inc., licensee of Station KXOR-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 292C3 at Thibodaux are North Latitude 29-37-36 and West Longitude 90-45-07.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-D-93-003

Application for authority to discontinue operation of the St. Thomas - Dominican Republic Cable and to modify the Cable Landing License.

**ORDER AND AUTHORIZATION**

**Adopted: February 8, 1993; Released: February 18, 1993**

By the Chief, International Facilities Division:

1. The above-captioned uncontested application, filed on November 3, 1992 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to permanently discontinue operation of the St. Thomas - Dominican Republic Cable and to modify the submarine cable landing license accordingly. The application was placed on public notice on November 25, 1992. No comments were received.

2. The St. Thomas - Dominican Republic Cable extends between Magens Bay, St. Thomas, U.S. Virgin Islands and Santo Domingo, Dominican Republic. The cable was placed in service on September 16, 1968 with an initial capacity of 144 voice-grade circuits (2.8kbps).[1] It is a Bell System designed SD type single armorless cable composed of two-way rigid transistorized repeaters for which off-the-shelf replacements are no longer readily available. On August 10, 1992, the cable failed when a private contractor damaged the cable in the Dominican Republic. The cable has been in service for 24 years and there are currently only 12 circuits in use. The co-owners believe the cable should be deactivated. AT&T states that users have made arrangements to transfer service and no one will be harmed by deactivation of the cable.

3. Upon review of the application, we find that the St. Thomas - Dominican Republic Cable has reached the end of its useful service life. AT&T understands that each foreign carrier has made necessary arrangements to transfer traffic from St. Thomas - Dominican Republic Cable to other facilities. Thus, there will be no impairment of service to any community or part of a community formerly served by the St. Thomas - Dominican Republic Cable as a result of its retirement.

4. Accordingly, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of use and operation by AT&T of the St. Thomas-Dominican Republic Cable and the substitution of other telecommunications facilities.

5. IT IS ORDERED that Cable Landing License, 8 FCC 2d 1016 (1967) IS HEREBY MODIFIED to delete the St. Thomas - Dominican Republic Cable.

6. Within 60 days after the release of this order, AT&T shall notify the Commission of the accounting treatment they intend to use in retiring the St. Thomas - Dominican Republic Cable.

7. Upon discontinuance of use and operation of the St. Thomas - Dominican Republic Cable, AT&T shall notify the Commission thereof and submit to the Commission for cancellation any submarine cable landing license it possesses covering the St. Thomas - Dominican Republic Cable.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *See* Commission's Order, 8 FCC 2d 1007 (released July 28, 1967), and Submarine Cable Landing License, 8 FCC 2d 1016 (1967).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-93-005

Application for authority to lease and operate satellite circuits for service between the U.S. and Europe the Middle East and North Africa.

**ORDER AND AUTHORIZATION**

**Adopted: February 8, 1993; Released: February 18, 1993**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 9, 1992 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate additional satellite circuits for the provision of service between the U.S. and points in Europe, the Middle East and North Africa which are not members of CEPT (the conference of 26 European Post/Telecommunications Administration) for the years 1993, 1994, 1995, 1996 and 1997. AT&T is currently authorized to lease and operate up to a total of 2,871 voice-grade satellite circuits, through year-end 1992, for service to the points listed in the attached Appendix.[1] The application was placed on public notice on October 21, 1992. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-005 IS GRANTED, and AT&T is authorized to:

a. lease from Comsat and operate up to a total of 2,138 voice-grade satellite half-circuits for 1993, up to a total of 2,185 voice-grade half-circuits for 1994, up to a total of 2,288 voice-grade half-circuits for 1995, up to a total of 2,308 voice-grade half-circuits for 1996, and up to a total of 2,489 voice-grade satellite half-circuits for 1997 between the U.S. and the points listed in the Appendix;

b. lease one-half interests in and operate necessary overseas connecting and/or transiting facilities;

c. lease and operate satellite half-circuits in excess of the numbers specified in subparagraph (a) in 1993-1996 up to the 2,489 satellite voice-grade half-circuits authorized for 1997; and

d. use said facilities to provide AT&T's regularly authorized services between the U.S. and the points listed in the attached Appendix, during the years 1993, 1994, 1995, 1996 and 1997.

3. All other terms and conditions of the Commission's blanket Order and Authorization released December 7, 1982, File No. I-P-C-82-045, remain the same.

4. AT&T shall file a new application for satellite circuits beyond 1997 for service between the U.S. and Europe, the Middle East and North Africa on or before October 1, 1997.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**APPENDIX**

**NON-CEPT COUNTRIES INCLUDED IN AT&T'S SATELLITE BLANKET (1/1/1993 - 12/31/1997)**

**Europe**

Bulgaria
Czechoslovakia
Commonwealth of Independent States (CIS)[2]
Gibraltar
Hungary
Poland
Romania

[1] The Commission's Order and Authorization released December 7, 1982 (File No. I-P-C-82-045) granted AT&T authority to lease and operate satellite circuits to non-CEPT countries for 1983, 1984 and 1985. This blanket authority was extended to year-end 1986 by an order released on December 31, 1985 in File No. I-T-C-86-018, and extended to year-end 1987 by an order released on December 31, 1986 in File No. I-T-C-87-010. *See* 1 FCC Rcd 1368 (1986). The Commission's Order and Authorization, DA 87-1881, released January 7, 1988 (File No. I-T-C-88-023) further extended AT&T's authority until December 31, 1988. *See* 3 FCC Rcd 36 (1988). The Commission's Order and Authorization, DA 88-2013, released January 12, 1989, File No. I-T-C-89-017 further extended AT&T's authority until December 31, 1989. *See* 4 FCC Rcd 546 (1989). The Commission's Order and Authorization, DA 90-171, released February 8, 1990, File No. I-T-C-90-021 further extended AT&T's authority for the years 1990, 1991 and 1992 *see* 5 FCC Rcd 749 (1990).

[2] CIS includes all of the States and Republics that comprised the former Soviet Union.

**North Africa**
Egypt
Libya
Tunisia

**Middle East**
Bahrain
Diego Garcia
Iran
Iraq
Israel
Jordan
Kuwait
Lebanon
Oman
Pakistan
Qatar
Saudi Arabia
Syria
United Arab Emirates
Yemen Arab Republic

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-93-006

Application for authority to lease and operate satellite circuits for service between the U.S. and the Caribbean area, Central America South America and Africa

**ORDER AND AUTHORIZATION**

**Adopted: February 8, 1993; Released: February 18, 1993**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 9, 1992 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate additional satellite circuits for the provision of service between the U.S. and the Caribbean area, Central America, South America and Africa for the years 1993, 1994, 1995, 1996 and 1997. AT&T is currently authorized to lease and operate up to a total of 8,633 voice-grade satellite circuits, through year-end 1992, for service to the points listed in the attached Appendix.[1] The application was placed on public notice on October 21, 1992. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-006 IS GRANTED, and AT&T is authorized to:

a. lease from Comsat and operate up to a total of 4,292 voice-grade satellite half-circuits for 1993, up to a total of 4,452 voice-grade half-circuits for 1994, up to a total of 4,362 voice-grade half-circuits for 1995, up to a total of 4,489 voice-grade half-circuits for 1996, and up to a total of 4,833 voice-grade satellite half-circuits for 1997 between the U.S. and the points listed in the Appendix;

b. lease one-half interests in and operate necessary overseas connecting and/or transiting facilities;

c. lease and operate connecting voice-grade circuits between the U.S.-Canada border and the Mill Village, Nova Scotia, Canada earth station as needed for restoration purposes;

d. lease and operate satellite voice-grade half-circuits in excess of the numbers specified in subparagraph (a) in 1993, 1994, 1995 and 1996, up to the 4,833 satellite voice-grade half-circuits authorized for 1997; and

e. use said facilities to provide AT&T's regularly authorized services between the U.S. and the points listed in the attached Appendix, during the years 1993, 1994, 1995, 1996 and 1997.

3. All other terms and conditions of the Commission's blanket authorization, cited in paragraph 1 above, remain the same.

4. AT&T shall file a new application for satellite circuits beyond 1997 for service between the U.S. and the Caribbean area, Central America, South America and Africa on or before October 1, 1997.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *See* Commission's Orders released on December 31, 1985 (Mimeo No. 1687, File No. I-T-C-86-019), March 24, 1986 (Mimeo No. 3322, File No. I-T-C-86-061), October 17, 1988 (DA 88-1563, File No. I-T-C-88-182, 3 FCC Rcd 6061 (1988), January 12, 1989 (DA 88-2064, File No. I-T-C-89-019, 4 FCC Rcd 571 (1989), February 8, 1990 (DA 90-170, File No. I-T-C-90-018, 5 FCC Rcd 747 (1990)).

## APPENDIX

Caribbean

Antigua
Aruba
Bahamas
Barbados
Bermuda
Cayman Islands
Dominican Republic
French Antilles
Grenada
Haiti
Jamaica
Netherlands Antilles
St. Lucia
St. Vincent
Trinidad
Turks and Caicos

Africa

Algeria
Angola
Benin
Botswana
Burkina Faso
Cameroon
Cape Verde Islands
Congo
Ethiopia
Gabon
Gambia
Ghana
Guinea
Ivory Coast
Kenya
Lesotho
Liberia
Malawi
Mali
Mauritania
Morocco
Mozambique
Mauritius

Africa cont.

Niger
Nigeria
Senegal
Sierra Leone
South Africa
Sudan
Swaziland
Tanzania
Togo
Uganda
Zaire
Zambia
Zambabwe

Central America

Belize
Costa Rica
El Salvador
Guatemala
Honduras
Nicaragua
Panama

South America

Argentina
Bolivia
Brazil
Chile
Colombia
Ecuador
French Guiana
Guyana
Paraguay
Peru
Suriname
Uruguay
Venezuela

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-48**

In re Applications of

| | |
|---|---|
| LONE CYPRESS RADIO ASSOCIATES, INCORPORATED | File No. BPH-880210ML |
| HIGHLANDS BROADCASTING CO., INC. | File No. BPH-880211MK |
| S. JOHNSON & S. McCULLOUGH d/b/a J & M B/ng Co. | File No. BPH-880211MM |

For Construction Permit for a New FM Station, Channel 238A, in Carmel, California

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 10, 1993; Released: February 18, 1993**

By the Commission:

1. We have before us applications filed on August 17 and August 28, 1992 by Highlands Broadcasting Co., Inc. and Lone Cypress Radio Associates, Incorporated for review of the Review Board's decision in this case, 7 FCC Rcd 4403 (1992).[1] The Board held that the application of J & M Broadcasting Company is comparatively superior to the appellants' competing applications. We agree with the Board's disposition. However, two matters warrant comment.

2. Highlands and Lone Cypress argued in exceptions that the evidence shows that Sherrie McCullough's husband was so much involved in the prosecution of J & M's application that he must be regarded as an undisclosed principal and therefore that J & M does not deserve full quantitative integration credit. The Board rejected this contention because it found that Mr. McCullough's involvement had been marginal. 7 FCC Rcd at 4405 ¶10. The appellants contest this holding, but they present no persuasive argument for reversing it.

3. Lone Cypress alleges that a hearing exhibit that the Board did not consider reveals that Mrs. McCullough testified in a prehearing deposition that she regarded the application as a joint venture with her husband. The cited exhibit merely shows, however, that the money that she invested in J & M had been community property belonging equally to her husband -- which, as the Board recognized, is of no conclusive significance. *Id.*; see *Richard P. Bott, II*, 4 FCC Rcd 4924, 4929 ¶26 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 2508 (1990), aff'd sub nom. *Radio Representatives, Inc. v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991). Moreover, the evidence as to Mr. McCullough's involvement is even weaker, in one respect, than the Board indicated, as there is no basis for the finding, 7 FCC Rcd at 4405 ¶10, that he performed a financial study for J & M; rather, he testified that he had prepared the study for the licensee of an existing station. Tr. at 805.

4. Finally, to the extent that the Board suggested that precedent would preclude it from discrediting an informal, oral arrangement, 7 FCC Rcd at 4404 ¶6, we wish to emphasize that our determination that the ALJ and the Board properly credited J & M's integration proposal is based on the particular facts of this case. The relevant circumstances here are that: J & M expressly indicated in its application as originally filed that it was a general partnership between Stoddard Johnson and Sherrie McCullough, each of them having a 50 percent ownership interest and an equal say as to the conduct of the firm's business; they later memorialized the partnership agreement in a confirming letter signed by both and placed in evidence (Cal Tower Ex. 13); and they gave a credible explanation for having initially postponed preparation of a written agreement. 7 FCC Rcd at 415, 422 ¶7. Moreover, they confirmed in testimony that they have operated as 50-50 partners and intend to maintain the same equity split and manage the firm's affairs in collaboration as co-equals, albeit with a division of primary supervisory responsibility; and this evidence as to their terms of association is uncontroverted. 7 FCC Rcd at 424 ¶99.

5. ACCORDINGLY, IT IS ORDERED that the application for review filed by Highlands Broadcasting Co., Inc. on August 17, 1992 and the application for review filed by Lone Cypress Radio Associates, Inc. on August 28, 1992 ARE DENIED, and the grant of the application of S. Johnston & S. McCullough d/b/a J & M Broadcasting Co., BPH-880211MM, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Lone Cypress filed an opposition to Highlands' application for review on September 1. J & M Broadcasting Company filed a combined opposition to both applications for review on September 9. Highlands filed an opposition to Lone Cypress's application for review on September 10.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

CLIFFORD STANTON HEINZ TRUST d/b/a CSH CELLULAR — File No. 10367-CL-P-488-A-88

For Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 488, Chippewa, Minnesota

WENDY C. COLEMAN d/b/a WCC CELLULAR — File No. 11018-CL-P-468-A-89

For Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 468, Kent, Maryland

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 10, 1993; Released: February 19, 1993**

By the Chief, Mobile Services Division:

## I. INTRODUCTION; BACKGROUND

1. Moving Phones Partnership, L.P. (Moving Phones) has petitioned to deny the captioned non-wireline application of Clifford S. Heinz Trust d/b/a CSH Cellular (Heinz Trust). Florida Cellular Mobile Communications Corporation (Florida Cellular)[1] and JAJ Cellular Partnership (JAJ) have filed petitions to deny the captioned non-wireline application of Wendy C. Coleman d/b/a WCC Cellular (Wendy). We are consolidating the proceedings because they raise similar issues.[2] For the reasons discussed below, we deny the applications.

2. On April 8, 1992, the Commission held lotteries for the Chippewa, Minnesota (Chippewa) Rural Service Area (RSA) and the Kent, Maryland RSA (Kent). *Lottery Notice*, Mimeo No. 21449 (Jan. 29, 1992). Wendy won the Kent lottery, and Heinz Trust won the Chippewa lottery. Heinz Trust and Wendy are applicants in both markets, Wendy having filed a non-wireline application in the Chippewa RSA (Fee No. 9897663), and Heinz Trust having filed in the Kent RSA (Fee No. 9286301). Clifford Stanton Heinz (Heinz) is the trustee of the Clifford Stanton Heinz Trust. At the time the applications were filed, Wendy was a beneficiary of the trust.

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[1] After the pleading cycle was completed, Moving Phones sent a Joint Notice of Settlement Agreement (Joint Notice), signed by the parties' attorneys, by facsimile transmission (fax). It provides that:

> CSH Cellular and Moving Phones Partnership, L.P. hereby jointly notify the Federal Communications Commission . . . that they have agreed to settle their litigation regarding CSH Cellular's application in the above-captioned application proceeding.

The Joint Notice was faxed to the Commission on Saturday, January 9, 1993. Because the fax did not arrive during regular office hours nor does its substance *in haec verba* satisfy the Commission's settlement rules, it has no significance in this case. *See* 47 CFR § 0.403 (main office hours of Commission are 8:00 a.m. to 5:30 p.m., Monday through Friday); *cf.* 47 CFR § 22.29(b) (parties withdrawing pleadings must file notice with Commission). Furthermore, if we were to accept the Joint Notice as having been filed on the closest following business day, which would be January 11, 1993, then it would fail to meet the requirements of Section 22.927 of the Commission's Rules. The Joint Notice was signed only by the attorneys, whereas Section 22.927 requires the party seeking to dismiss or withdraw a petition to file a request for approval of the withdrawal, copies of related written agreements, and an affidavit personally signed by the party which certifies, among other things, that it has not received any money or consideration in excess of its legitimate and prudent expenses. *See Amendment of Part 22 for Unserved Areas, Third Report and Order*, FCC 92-472, [57 Fed. Reg. 53446 (Nov. 10, 1992) (effective Jan.11, 1993)] 7 FCC Rcd 7183, 7195 (1993). *See also Grady Lynn and Carol Lynn*, 7 FCC Rcd 2631 (1992) (denying two letter requests for withdrawal of application, pursuant to settlement, filed by withdrawing party, one prior to, and the other after, amendment of Part 70 broadcast settlement rules, where neither letter complied). Also, Florida Cellular filed a Notice of Withdrawal of its petition against the application of Wendy C. Coleman. Despite the formal withdrawal of the petition, we review the matters alleged to determine whether a grant of the application would serve the public interest. *See Twentieth Century Holdings Corp.*, 4 FCC Rcd 4052 (1989); *see also infra*, n.5. JAJ filed comments dated January 19, 1993 to Florida Cellular's Notice of Withdrawal, but we need not address this pleading for the same reasons.

[2] Moving Phones and Florida Cellular won the original lotteries for the captioned markets, but their applications were subsequently dismissed as defective. Moving Phones' application was dismissed because it violated the alien ownership restrictions. *Continental Cellular*, 6 FCC Rcd 6834 (1991). Moving Phones has appealed this decision. *Moving Phones v. FCC*, Case No. 91-1611 (D.C. Cir. filed Dec. 18, 1991). Florida Cellular's application was dismissed for cross-ownership violations. *Florida Cellular Mobile Communications Corp.*, 6 FCC Rcd 354 (Mobile Serv. Div. 1991), *aff'd* 6 FCC Rcd 691 (Com. Car. Bur. 1991), *request for stay denied*, 7 FCC Rcd 2079 (Mobile Serv. Div. 1992). The Commission dismissed Florida Cellular's last petition for reconsideration subsequent to the filing of the instant petition to deny. *Florida Cellular Mobile Communications Corp.*, FCC 92-510 (released Dec. 1, 1992)

## II. DISCUSSION

3. Moving Phones[3] and Florida Cellular argue in their petitions that both applications should be dismissed for violation of Section 22.921 of the Commission's Rules.[4] We find that a Section 22.921 (violation exists, but for reasons independent of those that the petitioners raise.[5] Section 22.921 of the Commission's Rules prohibits any party from having any direct or indirect ownership interest in more than one application for the same RSA. Under this standard, we find that Wendy had illegal multiple ownership interests in its and Heinz Trust's applications for the captioned markets. Accordingly, we will dismiss both of Heinz Trust's and Wendy's applications in both markets.

4. Analysis of the cross-ownership issue begins by defining the ownership structures of the applicants. Wendy is the 100 percent owner of her application, filing individually. Heinz Trust is a grantor trust, of which Heinz is the grantor and also the trustee, with 100 percent of the voting interests. *See* Heinz Trust Application, Exhibit 1. Heinz may revoke the trust at any time, and also replace the trustee. *Trust Document.*[6]

5. At the time the captioned applications were originally filed in 1988, Wendy was a beneficiary of the trust.[7] In general, a beneficiary's interest is a vested interest, and is regarded as something more than a legal chose in action. 76 Am. Jur. 2d, Trusts § 282. By virtue of her interest as a beneficiary of Heinz Trust, Wendy had an indirect ownership interest in its application. Therefore, both Wendy's and Heinz Trust's applications violate Section 22.921 of the Rules. The Common Carrier Bureau (Bureau) has held in regard to Section 22.921 of the Rules that:

> The word "ownership" in this rule is a general term in recognition of the fact that ownership can vary in degree and kind in different contexts. The term "owner" is a general term and is afforded a liberal construction when interpreted by courts. "Owner" has been defined as the person in whom property is beneficially vested, or the person who has the occupation or control or enjoyment of it. "Owner" describes one who has dominion over or an interest in or claim upon property, which may be less than absolute and unqualified title. An equitable owner is defined as one who does not have legal title but is entitled to the beneficial interest, *e.g.* a "chose in action," a monetary note or other contract, or damages for breach of covenant. 73 C.J.S. Property §§ 22, 25 (1983). The term includes the right to receive contract payments under an arrangement for sale of real property, (shares of corporate stock or certificates of corporate stock. 63 Am. Jur. 2d Property § 26 (1984).

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(*December Order*), *appeal filed, Florida Cellular Mobile Communications Corp. v. FCC,* Case No. 92-1664 (D.C. Cir. filed Dec. 24, 1992).

[3] Moving Phones also argues that Heinz Trust failed to file a full-size map with its application as required under Section 22.903 of the Rules. In reply, Heinz Trust claims that it did file the map. We agree with Heinz Trust. It appears on the engineering checklist filled out by the Cellular Radio Branch staff that all of the necessary maps were filed. Moving Phones also requests that any grant of the Heinz Trust application be conditioned on the outcome of Moving Phones' appeal. However, because we are dismissing Heinz Trust's application, this request is moot.

[4] In support of its cross-ownership allegations, Moving Phones submits Clifford Heinz's state civil complaint against his wife Catherine Elaine Havelock (Elaine), and her "natural children" Wendy C. Coleman and Jeffrey P. Massnick (Jeffrey). Heinz sued them for malpractice, fraud, conspiracy, and constructive trust. *See* Moving Phones Petition to Deny, Exhibit A (Heinz Complaint). Moving Phones asserts that certain of Heinz's "investment opportunities," to which the Heinz Complaint refers, are in effect Heinz-funded "applications for cellular licenses filed by Jeff Massnick with the FCC." Wendy and Jeffrey filed cellular applications as "JPM Cellular", received licenses, and sold them, Moving Phones alleges. Heinz Trust replies that Moving Phones failed to make a prima facie showing that a cross-ownership violation exists. It alleges that the California Superior Court concluded that:

> There was no agreement between Plaintiff Clifford Heinz and any of the three defendants, Elaine Heinz, Jeffrey Massnick or Wendy Coleman requiring any of the defendants to share with him or anyone else any RSA application, license or proceeds they might obtain from their cellular applications.

*Heinz v. Havelock,* Case No. 635521 (Cal. Super. Ct., Orange Cty., Aug. 1, 1992) (*Orange County Order*). Heinz Trust argues that the *Orange County Order* conclusively rebuts any cross-ownership allegations. We disagree. While it is proper for state courts to determine the existence of contractual agreements, the Commission ultimately must decide cross-ownership issues in accordance with its rules.

[5] In its petition, Florida Cellular argues that Heinz Trust has an undisclosed interest in Wendy's application because Heinz, as trustee, executed a firm financial commitment letter for Wendy's application, and was also in a family relationship "by blood or marriage" with Wendy. Florida Cellular Petition to Deny at 7. Florida Cellular also argues that Wendy relies on a defective firm financial commitment letter in violation of Section 22.917(c) of the Rules. *Id.* at Exhibit 2. Lastly, JAJ argues in its petition that Wendy's application is defective because someone other than the principal, Wendy C. Coleman (Wendy), allegedly signed some of the documents in the application. On December 31, 1992, JAJ filed a supplement to its petition to deny. Wendy filed a reply to the supplement and a motion to strike it. JAJ then filed a further supplement to its petition on January 28, 1993. We need not reach the arguments raised in the extra pleadings, however, as we are dismissing the applications for cross-ownership violations as discussed herein. *See infra* at paras. 4 and 5; *see also supra* n.1.

[6] Copies of the trust were filed with the Commission pursuant to a request for further information. *See,* Letter From Chief, Mobile Services Division, to Mr. Stephen Kaffee (Oct. 6, 1992); *Public Notice,* Rep. No. CL-93-10 (released Oct. 16, 1992).

[7] On November 21, 1988, Wendy was a beneficiary of the trust when the applications were filed and continued to be so until after the JAJ and Florida Cellular petitions to deny were filed on July 29, 1992. In the *Amendment in Total of Clifford Stanton Heinz Trust* at 4.03(D) & (E), executed on July 15, 1987, Wendy and Jeffrey were made beneficiaries of $250,000 each. Wendy's interest was next changed in the *Second Amendment in Total of Clifford Stanton Heinz Trust* at 4.03(I), which was executed on March 12, 1990, reducing the beneficial amount to $1.00 "[b]ecause [Heinz] has made other substantial provisions (directly or indirectly) for ELAINE, JEFFREY and WENDY." Wendy's interest was not completely omitted until September 22, 1992, when the *Clifford Stanton Heinz Trust (Restated)* was executed.

*Algreg Cellular Engineering (Hearing Designation Order)*, 6 FCC Rcd 2921, 2925 (Com. Car. Bur. 1991). It is also a well-settled principle of the law of trusts that "[t]he trustee has legal title to the trust and each beneficiary is said to have an equitable interest . . . . Only the beneficiaries can sue to enforce the trust and their suit is on the theory that they are the beneficial owners of the trust property." J. Riche *et al.*, Decedents' Estates & Trusts 335 (4th ed. 1971). It has also been found that in businesses and real estate ventures managed by trustees, their role is to "manage [the trust] for the benefit of the beneficial owners; the ownership of the latter is evidenced by negotiable (or transferable) shares." *Black's Law Dictionary* 1684 (4th ed. 1968). Accordingly, because of the cross-ownership violations both applications in both markets will be dismissed for violation of Section 22.921 of the Rules. *See Florida Cellular Mobile Communications Corp., supra* n.2; *Corporate Telecom Services Inc.*, 6 FCC Rcd 5814 (Com. Car. Bur. 1991), *app. for review pending; cf. Algreg*, 6 FCC Rcd at 2931 (ownership interests under Section 22.921 not limited to those set forth in the broadcast attribution rules).

## III. CONCLUSION

6. The applications filed by Heinz Trust and Wendy in the captioned markets violate Section 22.921 of the Rules. Therefore, both applications in both markets will be dismissed.

## IV. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED that the Petition to Dismiss or Deny, or in the Alternative to Condition Grant filed by Moving Phones Limited Partnership IS GRANTED.

8. IT IS FURTHER ORDERED that the application filed by Clifford Stanton Heinz Trust d/b/a CSH Cellular, File No. 10367-CL-P-488-A-88, IS DISMISSED.

9. IT IS FURTHER ORDERED that the Petition to Dismiss or Deny filed by JAJ Cellular Partnership IS GRANTED.

10. IT IS FURTHER ORDERED that the Petition to Dismiss or Deny filed by Florida Cellular Mobile Communications Corporation IS DISMISSED, pursuant to its request.

11. IT IS FURTHER ORDERED that the application filed by Wendy C. Coleman d/b/a WCC Cellular, File No. 11018-CL-P-468-A-89, IS DISMISSED.

12. IT IS FURTHER ORDERED that the application filed by Wendy C. Coleman d/b/a WCC Cellular, Fee No. 9897663, IS DISMISSED.

13. IT IS FURTHER ORDERED that the application filed by Clifford Stanton Heinz d/b/a CSH Cellular, Fee No. 9286301, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

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|---|---|
| WAELDER INDEPENDENT SCHOOL DISTRICT Waelder, TX | File No. BPLIF-910702DA |
| FLATONIA INDEPENDENT SCHOOL DISTRICT Waelder, TX | File No. BPLIF-910702DB |
| SHINER INDEPENDENT SCHOOL DISTRICT Waelder, TX | File No. BPLIF-910702DC |
| LULING INDEPENDENT SCHOOL DISTRICT Waelder, TX | File No. BPLIF-910801DC |
| MOULTON INDEPENDENT SCHOOL DISTRICT Gonzales, TX | File No. BPLIF-911008DH |
| YOAKUM INDEPENDENT SCHOOL DISTRICT Gonzales, TX | File No. BPLIF-911008DI |
| STOCKDALE INDEPENDENT SCHOOL DISTRICT Gonzales, TX | File No. BPLIF-911008DN |
| HALLETTSVILLE INDEPENDENT SCHOOL DISTRICT Gonzales, TX | File No. BPLIF-911008DP |

For Construction Permit and License in the Instructional Television Fixed Service

## MEMORANDUM OPINION AND ORDER

**Adopted: February 5, 1993; Released: February 19, 1993**

By the Commission: Commissioner Marshall not participating.

1. The Commission has before it for consideration two groups of applicants for construction permits and licenses in the Instructional Television Fixed Service (ITFS) which are mutually exclusive. The first group, proposing to transmit from Waelder, Texas, is composed of: Shiner Independent School District (Shiner), channels A1-A4; Flatonia Independent School District (Flatonia), channels B1-B4; Waelder Independent School District (Waelder), channels C1-C4; and Luling Independent School District (Luling), channels D1-D4. The second group, proposing to transmit from Gonzales, Texas, is composed of: Hallettsville Independent School District (Hallettsville), channels A1-A4; Stockdale Independent School District (Stockdale), channels B1-B4; Yoakum Independent School District (Yoakum), channels C1-C4; and Moulton Independent School District (Moulton), channels D1-D4. The four applicants proposing to transmit from Waelder are not mutually exclusive with each other, and the four applicants proposing to transmit from Gonzales are not mutually exclusive with each other. However, the Waelder applicants are mutually exclusive with the Gonzales applicants.

### BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the eight applicants. All applicants are qualified to be ITFS licensees. They are governmental organizations engaged in the formal education of enrolled students, and they are accredited by the Texas Education Agency. Although they all propose to serve students outside their districts, because they also propose to serve schools within their own districts, they qualify as local applicants.

### MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to

[1] A "local" applicant is generally an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Before determining the number of points awarded to each applicant in this case, we shall address a Request for Reconsideration submitted by Shiner, Flatonia, Waelder and Luling. The request, filed in response to a July 20, 1992 staff letter informing the applicants of the points to be awarded, has been referred to the Commission pursuant to Section 1.104(b) of our Rules. Those applicants oppose, on the following grounds, the absence of programming merit points in their favor. First, they assert that all programming they propose is formal educational, as evidenced by the programming schedule and Exhibit C of each application. All ITFS applicants detail their formal educational and other ITFS programming proposals in both an illustrative schedule and a program grid. Yet, the schedules fail to indicate which programming is formal (that is, to be delivered to enrolled students for credit), as requested in Question 5, Section IV of the application, and we therefore consider the programming on the applicants' schedules as nonformal for the purpose of determining programming merit points. *Valley View Independent School District*, 7 F.C.C. Rcd 7228 (1992), *recon. pending on other grounds*. Exhibit C of the applications, submitted in response to Question 3, Section IV of Form 330, which requests justification of four channels, merely refers to the proposed programming as "educational" and "designed to supplement the classroom." Moreover, Exhibit C, like the schedule, fails to specify which programs are formal educational, or those for which students earn credit.

5. Second, Shiner, Flatonia, Waelder and Luling contend that their programming grids reflect only the minimum amount of ITFS usage required by the Commission's Rules and were not intended to reflect what their comparative positions would be. However, Question 6, Section V of F.C.C. Form 330, sets out a program grid which requires that the applicant specify, among other things, both the "*[t]otal* hours of education programming for credit for enrolled students on [each] channel" and the "*[t]otal* hours other ITFS service (see § 74.931(b)) on [each] channel." (Emphasis added.)[3] The grid, to this extent, is a summary of the amounts of formal educational and other ITFS programming proposed per channel per week that is set forth in hourly program segments on the illustrative schedule. While Shiner, Flatonia, Waelder and Luling would read this portion of the grid as requiring only that applicants list the *minimum* amount of ITFS usage required by the Commission's Rules, that interpretation is not supported by the clear language of Question 6. Resolving internal inconsistencies created by an applicant to its comparative advantage, we believe, would be grossly unfair to applicants whose proposals are internally consistent and could foster undesirable comparative gamesmanship. Accordingly, we find that it is consonant with elementary fairness that we review the application as a whole, including both the grid and the schedule, in order to determine what the applicant is actually proposing.

6. Third, Shiner, Flatonia, Waelder and Luling argue that to the extent that their grids are inconsistent with their proposed schedules, those inconsistencies "are evidently typographical errors" and can be corrected by minor amendment. Whether the hours noted in the grid are typographical or intentional, an amendment after the "B" cut-off date which, in essence, increases the proposed programming hours would be an amendment rendering a comparative advantage and contrary to *Second Report and Order*, 101 F.C.C. 2d at 74. However, we note that rather than being evident typographical errors, it appears from the four applicants' grids, whose programming hours are all the same, that the hours were intentionally listed. In addition, the applicants' contention that the grids are meant to reflect the minimum required hours of ITFS service is further indication that the applicants intentionally completed the grids with the minimum number of hours.

7. Fourth, according to Shiner, Flatonia, Waelder and Luling, the Commission policy of considering the lesser amount for purposes of awarding merit points where the grid and schedule are inconsistent is a new policy "which appears to be a drastic departure" from prior standards, one mandating a rulemaking proceeding, and denies applicants the right to comparative evaluation. We disagree. The Commission may interpret and apply its rules in the context of specific adjudications without prior notice and comment. The policy against comparative upgrading is not a "drastic departure" but is, instead, a long-standing feature of comparative proceedings in all contexts. *See e.g., Doylan Forney*, 5 F.C.C. Rcd 5423, 5425 (1990), *aff'd per curiam*, 951 F.2d 1324 (D.C. Cir. 1991)("It is the firm policy of the Commission that amendments are not to be used as vehicles for comparative upgrading.") The application of that policy here is "new" only because comparative proceedings in ITFS are new. Moreover, unlike *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398 (D.C. Cir. 1968), which the applicants cite for support, the policy here results in neither the dismissal of the applications nor the denial of an opportunity for comparative evaluation; it results in a consideration by the Commission of the lesser of two inconsistent programming proposals with regard to comparative merit points. Basic eligibility is not affected.

8. Finally, Shiner, Flatonia, Waelder and Luling assert that they, like the competing applicants, are entitled to programming merit points and, based on *Melody Music*,

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[2] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

[3] The grid also seeks to ascertain whether airtime on any channel will be used for non-ITFS purposes and, if so, the total hours which are not accounted for in the illustrative schedule over which the applicant will maintain control by reservation or preemption authority.

*Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), the Commission has an obligation to treat similar applicants similarly. We note, however, that the competing applicants, Moulton, Yoakum, Stockdale and Hallettsville, each submitted a schedule and grid indicating 22 hours of formal educational programming per channel per week. Those proposals are entitled to merit points whereas those of Shiner, Flatonia, Waelder and Luling are not. The two groups of applicants, therefore, are not similar and *Melody Music* does not apply.

9. Accordingly, under the comparative selection process, Shiner, Flatonia, Waelder, Luling, Hallettsville, Stockdale, Yoakum and Moulton are awarded points based on the following criteria:

**Localism**. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

**Accreditation**. Each applicant, accredited by the Texas Education Agency, is entitled to three points for accreditation.

**Four-Channel Limitation**. None of the applicants is the licensee of, or has filed, applications for additional ITFS channels in the Waelder and Gonzales, Texas areas. Consequently, each is entitled to two points for remaining within the four-channel limitation.

**Instructional Programming**. As noted above, ITFS applicants detail their formal educational and other ITFS programming proposals in both an illustrative schedule and a program grid. Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, 7 F.C.C. Rcd 5924 (1992). The illustrative schedules of Shiner, Flatonia, Waelder and Luling all propose an average of 24.375 hours of educational programming per channel per week. Because the schedule does not indicate which ITFS programs are formal, or those to be delivered to enrolled students for credit, as requested in Question 5, Section IV of the application, we shall consider this programming, also as discussed above, as nonformal for the purpose of determining merit points. *Valley View Independent School District*, 7 F.C.C. Rcd 7228 (1992). In contrast, their programming grids propose an average of four hours of formal educational programming per channel per week.[4] Thus, Shiner, Flatonia, Waelder and Luling are entitled to no programming points.

Hallettsville, Stockdale, Yoakum and Moulton each submitted an illustrative schedule and programming grid proposing an average of 22 hours of formal educational programming per channel per week. Accordingly, they are each entitled to one merit point for instructional programming.

**E- and F-Channel Group Relocation**. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels; therefore none is entitled to the one point for such applicants.

**Total**. Shiner, Flatonia, Waelder and Luling are each entitled to points for being local, for being accredited and for observing the four-channel limitation, for a total of nine points. Hallettsville, Stockdale, Yoakum and Moulton are each entitled to points for being local, for being accredited, for observing the four-channel limitation, and for proposing at least 21 hours of formal educational programming, for a total of 10 points. Although Hallettsville, Stockdale, Yoakum and Moulton are tied, none is mutually exclusive with any of the other three in that group. Thus, they are all selectees.

## OTHER MATTERS

10. Hallettsville, Stockdale, Yoakum and Moulton propose to lease their excess capacity for non-ITFS use, as permitted by Section 74.931, to Guadalupe Valley Electric Cooperative, Inc. However, they have submitted only the portions of the lease agreements relevant to our comparative selection process, the airtime and reservation provisions. Because submission of copies of the complete agreements is a prerequisite for obtaining a license, *Second Report and Order*, 101 F.C.C. 2d at 91, the authorizations of Hallettsville, Stockdale, Yoakum and Moulton are conditioned upon our receipt of lease agreements which comply with the Commission's rules. Additionally, there are no petitions to deny the applications of Hallettsville, Stockdale, Yoakum or Moulton, and we find them all to be fully qualified.

11. Accordingly, IT IS ORDERED, That the Request for Reconsideration filed by Shiner, Flatonia, Waelder and Luling, considered as an application for review, IS DENIED. IT IS FURTHER ORDERED That the applications of Hallettsville Independent School District, for channels A1-A4 (BPLIF-911008DP), Stockdale Independent School District, for channels B1-B4 (BPLIF-911008DN), Yoakum Independent School District, for channels C1-C4 (BPLIF-911008DI), and Moulton Independent School District, for channels D1-D4 (BPLIF-911008DH) ARE GRANTED, subject to the condition that within 30 days from the date of this Order, those applicants submit to the Chief, Mass Media Bureau for approval information demonstrating compliance with Commission requirements, including, if appropriate, copies of the lease agreements. The applications of Shiner Independent School District (BPLIF-910702DC), Flatonia Independent School District (BPLIF-910702DB), Waelder Independent School District (BPLIF-910702DA) and Luling Independent School District (BPLIF-910801DC) ARE DENIED.

12. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

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[4] The programming grids of Shiner, Flatonia, Waelder and Luling, which represent that there will be at least some formal educational programming, are sufficient to satisfy the programming requirements of Section 74.931(a). However, we note that we are unable to consider the amended programming grids submitted by these applicants on September 9, 1992, nearly nine months after the "B" cut-off date, which, in this case, was December 30, 1991. Even if we were to consider the amendments, which propose 25 hours of formal educational programming per channel per week, the grids would remain inconsistent with the illustrative schedules, which propose 24.375 hours of nonformal educational programming per channel per week, and thus would not be entitled to programming merit points.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

ROGER WAHL File No. BPH-880808MP

ROBERT A. BENNS File No. BPH-880812MU

For Construction Permit for a
New FM Station on Channel 227A
in Meyersdale, Pennsylvania

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 5, 1993; Released: February 19, 1993**

By the Commission:

1. The Commission has before it for consideration an application for review filed on July 27, 1990 by Robert A. Benns ("Benns"), an opposition thereto filed by Roger Wahl ("Wahl"), and Benns' reply. Benns seeks review of the action of the Mass Media Bureau ("Bureau") granting the application of Wahl for a construction permit for new commercial FM Station WQZS, Meyersdale, Pennsylvania, denying Benns' petition to deny the Wahl application, and denying Benns' own application for the Meyersdale facility. *See Letter from Chief, Audio Services Division to Counsel for Wahl and Benns (Reference No. 8920-HTS)*, dated July 3, 1990. For the reasons set forth below, we deny the application for review.

**BACKGROUND**

2. On May 23, 1988, the Commission released *Public Notice*, Report No. W-41, opening the window for the filing of mutually exclusive applications to serve Meyersdale, Pennsylvania on Channel 227A. The window opened with the release of the notice and closed on June 30, 1988. No applications were filed during this window. Subsequently, Wahl filed an application for this facility on August 8, 1988, and Benns filed his application four days later, on August 12, 1988. The Bureau's letter denied a petition to deny which Benns had filed against the Wahl application. Because the applications fell under the Commission's "first come/first served" rules, and because Wahl's application was "first filed" and was acceptable for filing, the Bureau granted Wahl's application, and dismissed Benns'. In his application for review, Benns argues that the Commission's "first come, first serve" processing rules are invalid as a matter of law and that the Bureau erred in not returning the Wahl application as unacceptable for tender.

**DISCUSSION**

3. *The "First Come, First Serve" Processing System.* In adopting the "hard look" processing rules for FM applications, we provided that "first come, first serve" processing would apply in cases where no applications were filed during the applicable filing window but more than one application was filed after the close of the window. *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19939 (May 13, 1985) (*"FM Processing Order"*), *recon. denied*, 50 Fed. Reg. 43157 (October 25, 1985), *aff'd sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987).[1] *See also Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) (affirming Commission application of "hard look" processing standards). In this system, the first application filed after closure of the window becomes the lead applicant; those filed thereafter are grouped in a processing queue. A queue applicant's rights ripen only upon a final determination that the lead application is unacceptable and if, after any predecessors in the queue are found unacceptable, the queue applicant is reached and found acceptable. *See* 47 C.F.R. § 73.3573(g)(3). In the instant case, Wahl's application, filed August 8, 1988, was the lead application; Benns application, filed four days later on August 12, 1988, was the first and only queue application.

4. In his application for review, Benns alleges that the Bureau's application of the "first come, first serve" processing system stripped him of his rights to a comparative hearing, established in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), by depriving him of notice of the filing of Wahl's application. Such notice, states Benns, would have enabled him "to make an intelligent decision whether to proceed with his own application or not." Benns App. Rev. at 3. Benns also argues that he was prejudiced by Wahl's failure to timely comply with Section 73.3580, which requires an applicant to give local public notice within 30 days of the filing of his application. Benns further claims that the injury resulting from his lack of notice was "compounded" when his counsel checked with the Bureau staff and was informed that the Commission's database did not reflect the filing of any application for Meyersdale, even though Wahl had in fact filed his application four days earlier. In addition, Benns claims that the "first come, first serve" system is "nothing but a thinly veiled form of lottery" in contravention of the Commission's express decision not to apply lottery selection procedures to the FM broadcast service, *Random Selection Lottery Procedures*, 5 FCC Rcd 4002 (1990) (terminating MM Docket No. 89-15).

5. We disagree with these contentions. The Court in *Ashbacker* explicitly recognized that the Commission could promulgate regulations limiting the filing rights of competing applicants. 326 U.S. at 333 n.9. *See also FM Processing Order*, 50 Fed. Reg. at 19939. Notice of our revised commercial FM processing procedures was provided twice, first with the publication on May 13, 1985 of the *FM Processing Order* in the Federal Register, and again the following year with our clarification in *Public Notice*, "Operation of First Come/'First Serve' FM

[1] The Commission recently modified the "hard look" processing rules, and made these revised rules effective as of August 7, 1992. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd 5074 (1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt. Nonetheless, in revising the "hard look" rules, we did not change the "first come, first serve" processing system."

Broadcast Application Processing System," FCC 86-265, 51 Fed. Reg. 23764 (July 1, 1986) ("First Come/First Serve"). In adopting the "first come, first serve" processing system, we explicitly stated:

> By designating "window" filing dates, all interested parties will be on notice that the Commission will grant the vacant channel to a sole qualified applicant who files or that it will designate mutually exclusive applicants for a comparative hearing. Under the "first come, first serve" aspect of our proposal, all vacant channels that are not applied for during the window will be granted to the first qualified applicant to file.

*FM Processing Order*, 50 Fed. Reg. at 19939 (footnote omitted). In clarifying this procedure, we stated:

> The [*FM Processing Order*] recognized that no applications at all might be filed during the pertinent window. In such a case, the "first come/first serve" processing system automatically commences the day after the window period expires . . . . A construction permit will issue to the first fully qualified applicant to file a tenderable and acceptable application.

*First Come/First Serve*, 51 Fed. Reg. at 23764 (internal citation omitted). Thus, all applicants, including Benns, were adequately on notice of the requirements of the "first come, first serve" processing system.[2]

6. Further, Benns' argument that the "first come, first serve" system adopted in MM Docket 84-750 is in reality a "thinly veiled form of lottery," and that we rejected a lottery system in MM Docket No. 89-15, is unpersuasive. The latter docket considered whether to substitute a random selection method, such as the lottery procedure used in the low power television service, in place of comparative hearings to determine the eventual permittee from a pool of timely-filed mutually exclusive applicants. *Notice of Proposed Rule Making* in MM Docket No. 89-15, 4 FCC Rcd 2256, 2260-2264 (1989). In contrast, the "first come, first serve" approach, activated only when no acceptable application has been filed during the window, is the antithesis of random selection, restricting selection of the permittee to the first acceptable post-window applicant.

7. *The Wahl Application*. In his application for review, Benns reasserts that the Wahl application should have been returned as untenderable for several, independent reasons. First, referencing a less than fully legible copy of Wahl's contour map attached to Benns' "Motion to Dismiss for Want of Tenderability," filed on June 26, 1990,[3] Benns avers that Wahl's map did not depict the legal boundaries of the community of Meyersdale. However, the original of this map (Figure 5 in the engineering exhibit of the Wahl application) is legible, contains an arrow pointing to Meyersdale, clearly depicts the community boundaries and the 70 dBu contour, and has a scale of distance in kilometers and miles. Moreover, the map clearly shows that the boundaries of this small community[4] lie well within the 70 dBu contour.[5]

8. Also, Benns' conclusory allegation that the engineering exhibit in Wahl's application is replete with "gross inconsistencies" is without merit. The Bureau found that any discrepancies in the exhibit were due solely to rounding of the heights within the permissible roundoff tolerance of one meter, that the application complied with the Commission's technical requirements, and that Wahl's proposed tower does not require FAA clearance. In its application for review, Benns has not specifically shown any error by the Bureau in these respects.

9. Finally, Benns again offers Wahl's delayed compliance with the publication requirements of the local public notice rule, 47 C.F.R. § 73.3580, as a basis for reversing the Bureau's acceptance of the Wahl application for tender. We affirm the Bureau's action. First, it is undisputed that Wahl certified in its application that he had complied or would comply with the publication rule and, thus, he complied with the pertinent tenderability requirement. *See FM Processing Order*, Appendix D, Item 2(c), 50 Fed. Reg. at 19945; *cf. The Taber Broadcasting Company of New Mexico*, 4 FCC Rcd 7892 (1989) (affirming that lack of local public notice *certification* renders application untenderable).[6] Second, Benns has not refuted Wahl's showing that he published local public notice, albeit within

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[2] To the extent that Benns' argues that, under any processing system which complies with *Ashbacker*, applicants must be provided an opportunity to examine any prior filed application before deciding whether to file, his argument is unpersuasive. Under any processing system, there is potential for the type of uncertainty about which Benns complains. For instance, under the pre-"hard look" rules, applicants filing on the "A" cut-off date, *see FM Processing Order*, 50 Fed. Reg. at 19937, would not know if any other applications were also filed on, or shortly before, that date. *See, e.g., Kittyhawk Broadcasting Corp.*, 7 FCC 2d 153, 154-155 (1967), *appeal dismissed sub nom. Cook, Inc. v. U.S.*, 394 F.2d 84 (7th Cir. 1968); *Florida Institute of Technology, Inc.*, 4 FCC Rcd 1549 (1989). Systems based on "A" and "B" cut-off dates continue to apply to AM, TV, and noncommercial educational FM applications.

[3] The Bureau's letter of July 3, 1990 fully considered the allegations in this motion, which were also referenced in Benns' petition to deny. The motion itself was dismissed as an unauthorized pleading.

[4] Meyersdale is a small community (1980 population: 2581) in Somerset County in southwest Pennsylvania.

[5] In addition, Wahl's transmitter site map (Figure 1) and Meyersdale Quadrangle map (Figure 1-A) confirm 70 dBu coverage of all of Meyersdale. They each depict a street grid for Meyersdale, identify the proposed transmitter site, and contain a distance scale. Further, using a dashed line (labelled "Corp Bdy"), these maps show the corporate boundary of Meyersdale in more detail than does the depiction of the community boundaries on Wahl's contour map. It is readily apparent from either map that the furthest point of Meyersdale is no more than five kilometers from the proposed transmitter site. Turning to Figure 5, it is also clear that the 70 dBu contour in the direction of Meyersdale (which extends approximately fifteen kilometers) greatly exceeds the five kilometer distance to Meyersdale's furthest point.

[6] An FM application is "tenderable" if the critical items identified in Appendix D are answered, rendering the application substantially complete. *RDH Communications, Limited Partnership*, 7 FCC Rcd 5564 (1992). This is a procedural determination which signifies that an application is sufficiently complete for further processing, *i.e.*, an evaluation of the substantive contents of the application, to begin. *Id.* Therefore, an application, such as Wahl's, will be considered tenderable if all relevant questions are answered, regardless of whether those answers, as a substantive matter, are correct.

*37* days after his application was filed. While the rule affords an applicant *30* days in which to comply, it does not require the publication of any notice prior to filing or within the four-day period immediately after filing.[7] Thus, even had Wahl's publication been timely, Benns would still have likely been unaware of Wahl's prior filing when he filed his own application four days later.[8] In any event, Benns' filing still would have occurred second in time.[9]

10. ACCORDINGLY, IT IS ORDERED, That the application for review filed on July 27, 1990 by Robert A. Benns IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[7] We note that the Bureau's finding that Wahl substantially complied with Section 73.3580 fully comports with governing Commission precedent. *See, e.g., WHDH-AM, Inc.*, 6 FCC Rcd 4329 (1991); *Seattle Public Schools (KNHC(FM))*, 103 FCC 2d 862, 868 (1986).

[8] That the Bureau staff also did not then know of Wahl's filing only four days earlier is simply irrelevant and does not provide Benns with any greater filing rights than the Commission's rules allow.

[9] Benns also seeks to "incorporate[] by reference and preserve[] all of the other arguments made in the pleadings attached" to its application for review. We deny this portion of the application for review because its fails to plead with particularity any specific errors in fact or law made by the Bureau. *See* 47 C.F.R. § 1.115(b).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 92-286**

In the Matter of

El Paso Public Safety Plan

**ORDER**

**Adopted: February 10, 1993; Released: February 19, 1993**

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On August 5, 1992, Region 50 (El Paso) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the El Paso area.

2. The El Paso Plan was placed on Public Notice for comments on November 27, 1992, 57 FR 57456 (December 4, 1992). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for El Paso and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in the El Paso area.

4. Therefore, we accept the El Paso Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in the El Paso area may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 92-287**

In the Matter of

Buffalo Public Safety Plan

**ORDER**

**Adopted: February 10, 1993; Released: February 19, 1993**

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On May 15, 1992, Region 55 (Buffalo) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the Buffalo area.

2. The Buffalo Plan was placed on Public Notice for comments on November 27, 1992, 57 FR 57456 (December 4, 1992). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Buffalo and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in the Buffalo area.

4. Therefore, we accept the Buffalo Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in the Buffalo area may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 92-288**

In the Matter of

Iowa Public Safety Plan

**ORDER**

**Adopted: February 10, 1993; Released: February 19, 1993**

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On June 23, 1992, Region 15 (Iowa) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Iowa.

2. The Iowa Plan was placed on Public Notice for comments on November 27, 1992, 57 FR 57456 (December 4, 1992). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Iowa and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Iowa.

4. Therefore, we accept the Iowa Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Iowa may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 19, 1993**

## Digital Audio Radio Service Satellite System Applications Acceptable for Filing

**Comments: April 9, 1993**
**Replies and Oppositions: May 21, 1993**
**Responses: June 25, 1993**

The Commission has found, upon initial review, that five applications for authority to construct, launch, and operate a satellite digital audio radio service (DARS) are acceptable for filing. The Commission reserves the right to return any of these applications, however, if, upon further review, any is determined to be defective or not conforming to the Commission's rules, regulations, or policies.

It also appears that the applications listed below, together with the application of Satellite CD Radio, Inc., see 7 FCC Rcd 6763 (1992), may be mutually exclusive on the grounds of electrical interference. The processing of these applications is therefore considered to be a restricted adjudicative proceeding. See 47 C.F.R. § 1.1208. Accordingly, the restrictions on ex parte communications of 47 C.F.R. §§ 1.1210 - 1.1216 apply to these applications. Specifically, all ex parte contacts are prohibited with respect to these proposals. An ex parte contact is a message (spoken or written) concerning the merits or outcome of any aspect of this proceeding made to a Commissioner, a Commissioner's assistant, or other decision-making staff member, other than comments officially filed at the Commission or oral presentations made with an opportunity for all parties to be present.

The applications are as follows:

**American Mobile Radio Corp.** — **File Nos. 26/27-DSS-LA-93, 10/11-DSS-P-93**

Application for authority to construct, launch, and operate a satellite digital audio radio service. The system application proposes an earth station for feeder links and for telemetry, tracking, and telecommand, two geostationary satellites, and numerous mobile and fixed receivers. The American Mobile Radio Corp. (AMRC) earth station will use the 6530-6535 MHz and 6540-6545 MHz bands for uplink transmissions and space stations will use frequencies in the 2310-2360 MHz band for downlink. One space station will downlink transmissions to the contiguous United States (CONUS) using a single CONUS beam. The other space station will provide an identical CONUS beam and transmit spot beams to provide service to Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands. AMRC proposes to offer 15 channels of compact disc quality programming and ancillary services on a non-common carrier, subscription basis. Some channels will be offered free-of-charge to the consumer on an advertiser-supported basis.

**Digital Satellite Broadcasting Corp.** — **File Nos. 28-DSS-LA-93, 12/13-DSS-P-93**

Application for authority to construct, launch, and operate a satellite digital audio radio service. Digital Satellite Broadcasting Corp. (DSBC) proposes to select one of three system designs (Systems A, B, and C hereafter) depending on DARS rulemaking developments by the Commission. Each system consists of an earth station for feeder links and for telemetry, tracking, and telecommand, one geostationary satellite, and numerous mobile receivers. The space station will provide a single beam transmission to the CONUS and provide spot beams to Alaska, Hawaii, and Puerto Rico. Spot beams will also provide supplementary service to 28 major metropolitan areas within the CONUS. Compact disc quality audio programming and ancillary services will be offered and downlinked to individual receivers in the 2310-2360 MHz band. System A proposes to uplink transmissions in the 6500-6855 MHz band offering 16 compact disc quality channels within the CONUS beam and 16 per spot beam. System B proposes 15 compact disc quality channels comprising the CONUS beam and 15 per spot beam using the 6620-6855 MHz band for uplink transmissions. System C is capable of increasing the CONUS channel capacity of System A or B by 40% or spot beam channel capacity by 12 channels. The proposed uplink frequency band for System C is 6425-6890 MHz. DSBC proposes to offer DARS on a subscription or pay-per-use basis and requests regulation as a non-common carrier. Also proposed is a basic DARS service where programming by existing broadcasters who have purchased channel capacity from DSBC will be available to anyone without subscription who purchase receiver equipment which is compatible with the satellite DARS system.

**Loral Aerospace Holdings, Inc.** — **File Nos. 14-DSS-P/LA-93, 15-DSS-P-93**

Application for authority to construct, launch, and operate a satellite digital audio radio service consisting of an earth station for feeder links and for telemetry, tracking, and telecommand, one geostationary satellite, and numerous mobile receivers. The proposed earth station will uplink transmissions within the 7046-7052 MHz band and the space station will downlink transmissions to individual receivers in the 2310-2360 MHz band using a single CONUS beam. Loral proposes to offer 32 compact disc quality channels and information services to the CONUS on a non-common carrier, subscription basis.

**Primosphere Limited Partnership** — **File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93**

Application for authority to construct, launch, and operate a satellite digital audio radio service. The Primosphere system includes an earth station to supply feeder links and telemetry, tracking, and telecommand to two geostationary satellites. The proposed uplink band is 7025-7075 MHz and the space stations will downlink transmissions within the 2310-2360 MHz band to portable, mobile and fixed receivers. Two space stations, each transmitting identical CONUS beams, will offer 23

compact disc quality channels and six non-music channels. Primosphere proposes to provide free, over-the-air, advertiser-supported audio programming.

| | |
|---|---|
| **Sky-Highway Radio Corp.** | **File Nos. 31/32-DSS-LA-93 18/19-DSS-P-93** |

Application for authority to construct, launch, and operate a satellite digital audio radio service. Sky-Highway's design includes an earth station for feeder links and for telemetry, tracking, and telecommand using uplink frequencies of 7048-7052 MHz, and two geostationary satellites for downlink to numerous fixed, mobile, and portable receivers on frequencies within the 2310-2360 MHz band. The Sky-Highway system will provide subscription satellite delivered compact disc quality audio services and ancillary information throughout the CONUS. One space station will provide service to the western half of the CONUS and the other will provide service to the eastern half. The two space stations will provide separate programming consisting of ancillary services and 15 channels of compact disc quality audio. Terrestrial rebroadcast is proposed to enhance reception in limited areas, as needed, using existing frequency assignments in the AM broadcast band. Use of current silent AM stations is proposed for the initial in-band infrastructure.

Comments or petitions regarding these applications may be filed on or before **April 9, 1993**. Replies and Oppositions may be filed on or before **May 21, 1993**. Responses may be filed on or before **June 25, 1993**.

For further information, contact Rosalee Chiara at (202)634-1781 or Ronald Repasi at (202)634-1841.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ACCESS LONG DISTANCE CORPORATION,
Complainant,

v.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

File No. E-89-422

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 29, 1993; Released: February 19, 1993**

By the Commission:

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## I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that Access Communications, Inc. (Access)[1] has met its burden of establishing that defendant local exchange carrier (LEC)[2] has violated Section 201(b) of the Communications Act by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986. In addition, we award Access damages and interest for defendant's rate of return violations.

## II. BACKGROUND

2. The Commission has previously held that LECs who had earned in excess of the prescribed rate of return for October 1, 1985 through December 31, 1986 violated Section 201(b) of the Communications Act (the "Act"), 47 U.S.C. § 201(b).[3] These decisions firmly establish that carrier rates that produce earnings in excess of the Commission's prescribed rate of return violate Section 201(b) of the Act[4] and allegations of such overearnings are sufficient to sustain a cause of action under Section 208 of the Act. Furthermore, the Commission has held that complainants may recover damages, including interest, from LECs who violated the Commission's rate of return prescription.[5]

3. While a detailed accounting of the applicable statutory scheme and relevant Commission and court decisions that preceded the filing of the captioned complaints is set forth in the *MCI Liability Order* [6] and will not be repeated here, a very brief review of the relevant rate of return prescription is helpful. The Commission prescribed a rate of return of 12.75 percent for the initial monitoring period of October 1, 1985 through December 31, 1986.[7] Because

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[1] On October 18, 1989, Access filed a motion to amend its complaint to show its correct name, Access Communications, Inc., and Utah as its place of incorporation. Defendant, Mountain States Telephone and Telegraph Company (MTN), acknowledged the motion to amend and did not object. MTN Answer and Motion to Dismiss at 1. We will grant Access's motion to amend its complaint.

[2] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaint, however, was filed prior to the consolidation. Accordingly, we shall refer to the defendant carrier as it was named in the complaint.

[3] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders* "), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam) and American Telephone and Telegraph Company v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[4] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[5] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, *et al.*, FCC 93-70 (released February 8, 1993) (*MCI Damages Order*) and AT&T Communications v. Northwestern Bell Telephone Company, FCC 93-69 (released February 8, 1993) (*AT&T Damages Order*).

[6] *MCI Liability Order*, 5 FCC Rcd at 217-218.

[7] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC

the initial review period would be 15 months rather than two years as adopted in subsequent periods, the Commission expanded the "buffer"[8] that would be used to determine whether the prescription had been violated during this initial monitoring period.[9] Carriers were given notice that a 13.10 percent level of earnings would be the maximum allowable rate-of-return on overall interstate earnings and 13.25 percent would be the maximum allowable return for any access service category.[10]

4. In September 1989, Access filed two formal complaints[11] against the defendant LECs alleging violation of the Commission's rate of return prescription.[12] In addition, Access reserved the right to file supplemental complaints for damages as provided for in Section 1.722 of the Commission's rules[13] because it could not determine the precise amount of damages it suffered at the time its complaints were filed. The defendant filed an answer and motion to dismiss. On June 9, 1992, the Common Carrier Bureau (Bureau) released an order establishing discovery and briefing schedules.[14] Pursuant to the *Discovery Order*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.

## III. DISCUSSION

### A. Liability For Damages

#### 1. Contentions of the Parties

5. Access alleges that the rates it paid for the defendant's interstate access services during the period from October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Act, 47 U.S.C. § 201(b). Access supports its allegations with evidence taken from reports filed with the Commission by the defendant for the 15-month period at issue that show that defendant achieved earnings in excess of the Commission's prescribed rate of return in one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[15]

6. Access requests that the Commission declare that the defendant LEC's charges for the period from October 1, 1985 through December 31, 1986 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendant to pay damages to Access equal to the difference between the amount actually paid by Access for interstate access service during the period and the amount that Access would have paid if the defendant's charges earned no more than the maximum allowable rate of return, plus interest on this amount from January 1, 1987 at the rate specified in the CC Docket No. 84-800 proceeding.

7. In response to complainant's allegations, defendant raises a number of issues that have been fully considered by the Commission in the *MCI Orders*. They will be briefly discussed below.

8. Defendant advances a variety of arguments that Access has failed to state a cause of action under the Act and that Access's claims are barred by *American Telephone and Telegraph v. FCC*.[16] The defendant contends that changing from an automatic refund structure to a complaint structure does not cure the inconsistencies the court found with respect to the automatic refund rule and allow the

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Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,103 (Apr. 1, 1986) *Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987), *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[8] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[9] *Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[10] 47 C.F.R. § 65.701(b).

[11] One of the complaints was withdrawn by the complainant. *See* Access Communications, Inc. v. Central Telephone Company, 5 FCC Rcd 178 (Com.Car.Bur. 1990). The remaining complaint was held in abeyance by the Commission pending resolution of a court remand in Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990) (*Illinois Bell I*). *See* Access Communications, Inc. v. The Mountain States Telephone and Telegraph Company, *et al.*, 6 FCC Rcd 649 (Com.Car.Bur. 1991) (*Abeyance Order*). Access filed an application for review of the *Abeyance Order* on March 7, 1991. MTN filed an opposition to the application for review. Access filed a reply and an unopposed motion to accept a late-filed pleading. The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991) (*Illinois Bell I Remand Decision*), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991). On December 13, 1991, the Bureau released an order that reactivated the instant case. *See* Order, 6 FCC Rcd 7291 (Com.Car.Bur. 1991). That action makes Access's application moot and, accordingly, we dismiss the application.

[12] The remaining defendant is the Mountain States Telephone and Telegraph Company (MTN).

[13] 47 C.F.R. § 1.722.

[14] Access Communications, Inc. v. The Mountain States Telephone and Telegraph Company, 7 FCC Rcd 3509 (Com.Car.Bur. 1992) (*Discovery Order*). Access served interrogatories on MTN on June 18, 1992. MTN responded on July 8, 1992. MTN served interrogatories on Access to which Access responded on July 8, 1992. Access filed its brief on July 28, 1992 (Access Br.) and the defendant filed its brief at the same time (MTN Br.). Access filed its reply brief on August 7, 1992 (Access RBr.) and MTN filed its reply brief on August 12, 1992 (MTN RBr.).

[15] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702 (1990). Access states that the monitoring reports recite that for the period October 1, 1985 through December 31, 1986, MTN earned a return of 13.67% in the switched traffic sensitive category in Utah.

[16] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court

awarding of damages in the instant complaint.[17] Defendant argues that the Commission must consider underearnings in determining whether particular overearnings are in violation of the Act.[18] Additionally, defendant argues that it is contrary to *AT&T v. FCC* to find a rate of return violation when overall earnings for interstate access service did not exceed 13.10 percent regardless of access category earnings in excess of 13.25 percent.[19]

9. Defendant also argues that the Commission is engaging in retroactive ratemaking if it orders a carrier to make refunds solely because the carrier has exceeded the authorized rate of return.[20] Defendant also argues that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[21]

10. The defendant argues that all of Access's claims are barred by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[22] According to defendant, Section 415 bars the recovery of any damages if sought more than two years after the occurrence of any overearnings, in this case, thus barring all recovery after December 31, 1988.[23]

11. Defendant makes the additional argument that the decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, requires dismissal of Access's complaints.[24] According to the defendant, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages on an individual operating company basis without taking into account total company earnings.[25] Defendant contends that these propositions are not narrowly confined to the Commission's ratemaking activities under Sections 204-205 of the Act[26] but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

**2. Discussion**

12. We have carefully examined the record before us and conclude that the defendant, who was also a defendant in the MCI complaint proceedings, has cited no facts and has made no argument here that would warrant a ruling contrary to the *MCI Orders*.

13. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected an identical claim made by the same defendant and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[27] We stated that

> we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * * * * * *
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> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[28]

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invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC*, *see MCI Liability Order*, 5 FCC Rcd at 221-223. The Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order that dealt with refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell Telephone Company v. FCC*, 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

In the Matter of Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[17] MTN Answer, Affirmative Defenses, and Motion to Dismiss (MTN Answer) at 5.

[18] MTN Answer at 6-7.

[19] *Id.* at 6. Extending this argument even further, MTN contends that the key rate of return with which Access should be concerned is the overall earnings of US West Communications (USWC) in the aggregate, not the individual categorical earnings of USWC's subsidiaries. In the aggregate, USWC earned 12.73% overall. *Id.*

[20] MTN Br. at 6-7.

[21] MTN Answer at 8.

[22] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[23] MTN Answer at 9. Access argues that it had until September 30, 1989 (two years from the date MTN filed its final monitoring report) to file its complaint. Access Opposition to Motion to Dismiss at 13-14.

[24] MTN Supplement to Motion to Dismiss at 3 and 5.

[25] MTN Supplement to Motion to Dismiss at 4.

[26] 47 U.S.C. §§ 204-205.

[27] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[28] *MCI Liability Order*, 5 FCC Rcd at 223 (emphasis in the original).

We found further that *AT&T v. FCC* did not pertain to Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[29]

14. In addition, we have previously held that enforcement of a rate of return prescription is not a violation of the rules against retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[30] Defendant has not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[31] We point out that the issue is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

15. *Statute of Limitations:* Access is correct in its assertion that it had until September 30, 1989 to file its complaint based on the monitoring report filed by defendant with the Commission on September 30, 1987.[32] We have previously held that the date of the filing of the final monitoring report is the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[33] Defendant has made no argument that persuades us to alter this holding. Section 415 does not bar Access's complaint.

16. *Ohio Bell:* We disagree with the defendant's claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss Access's complaints. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[34] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss "individual complaints for damages; they did not invalidate private actions for damages; and their analysis is not applicable to the different and separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendant has violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making its rates unjust and unreasonable under Section 201 of the Communications Act and itself liable for damages to the extent a complainant can establish that it was damaged as a result of the violation.[35]

**B. Damages and Interest Claims**

17. Access's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendant's rate of return prescription violations is the difference between the amounts it actually paid the defendant for interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if the defendant's rates produced earnings that did not exceed the Commission's prescription. The defendant, however, has raised a number of challenges to Access's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order*, *MCI Damages Order*, *AT&T Liability Order*, and *AT&T Damages Order*. We address the parties' pertinent contentions below.

**1. Damages**

**a. Contentions of the Parties**

18. As noted above, Access's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendant's violations is the difference between the amount it actually paid defendant for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if the defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return. In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendant's rate of return violations could be that difference.[36] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by Access.[37] The defendant was invited to submit evidence that could serve to mitigate or otherwise reduce Access's damages claims. Specifically, the Bureau stated that evidence that would show that Access's share of

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[29] *Id.*

[30] *Id.* at 222.

[31] *Id.*

[32] Access cites to the Bureau's Show Cause Orders in both the AT&T and MCI proceedings to support its argument. *See, e.g.*, MCI Telecommunications Corp. v. Michigan Bell, *Order to Show Cause*, 4 FCC Rcd 6099, 6101, n.8. This holding was subsequently adopted by the Commission. *See MCI Liability Order*, 5 FCC Rcd at 224-25.

[33] *MCI Liability Order*, 5 FCC Rcd at 225.

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

We note further that we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order*, 5 FCC Rcd at 3464.

[34] *See MCI Liability Order*, 5 FCC Rcd at 222-23.

[35] *See id.* at 226.

[36] *Discovery Order*, 7 FCC Rcd at 3510.

[37] *Id.*

excessive earnings realized in a particular access category by a defendant could be offset or otherwise reduced due to facts and circumstances surrounding Access's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[38]

19. Under its damages approach, Access states that it should be awarded damages of $1,372 from MTN, exclusive of interest, which it claims represent Access's contribution to MTN's earnings above the maximum 13.25 percent rate of return prescribed by the Commission for the switched traffic sensitive category.[39] Access states that the data underlying these calculations were taken from the defendant's Form 492, defendant's response to discovery in this proceeding, and complainant's records.[40] To derive the stated amount, Access calculated, for the study area and access service category in which the defendant's earnings exceeded the rate of return prescription of 12.75% plus the .50% buffer, the percentage of defendant's revenues allocable to complainant. Access then multiplied this percentage by the amount of defendant's pre-tax overearnings[41] to get the amount it overpaid.[42] Access also claims interest calculated at the rate in CC Docket 84-800 from the date following the close of the 1985-1986 monitoring period.[43] Access contends it is entitled to interest on the damage amount which, through July 31, 1992, yields a total award of $2,875.[44]

20. The defendant challenges Access's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order*, *MCI Damages Order*, *AT&T Liability Order*, and *AT&T Damages Order*. MTN contends that by simply basing its damages claim on a calculation of Access's prorated share of category-level overearnings, Access asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[45] MTN maintains that such a result is expressly precluded by *AT&T v. FCC* and *Ohio Bell*. MTN next argues that Access is seeking a retroactive adjustment to MTN's rates for 1985-86 and any "refund/damages" awarded to Access would violate the rule against retroactive ratemaking.[46] In addition, MTN contends that a damages award to Access would drive USWC's overall company-wide rate of return further below the minimum necessary to raise capital and would constitute confiscatory ratemaking, and, accordingly, is expressly precluded by the courts' decisions in *AT&T v. FCC* and *Ohio Bell*.[47]

21. Defendant next contends that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude Access's damages claims, the claims still fail because Access's complaint does not establish a valid cause of action. According to defendant, to pursue a damages claim, Access must first show that the defendant charged unjust and unreasonable rates for interstate access services during the period in question, not that defendant's rates produced excessive returns in individual service categories.[48] Defendant maintains that by simply referencing defendant's earned rates of return for individual access service categories, Access has not only failed to allege any facts that would establish that defendant's rates were unjust and unreasonable during the period in question, but has also failed to show that it sustained actual damage as a result of those rates.[49]

22. The defendant raises several arguments to support its claims that an award of damages to Access based on carrier overearnings is inappropriate for equitable and policy reasons. MTN vigorously argues that Access is actually seeking restitution or a refund of tariffed charges, not damages. MTN argues that regardless of how Access characterizes the relief it seeks, any form of refund or restitution to Access would be contrary to the public interest.[50] MTN further contends that an award of damages would be inequitable because (i) USWC's total corporate rate of return would be driven below the confiscatory level; (ii) there was uncertainty surrounding the tariff filings

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[38] *Id.*

[39] Access Br. at 30 and Attachment A.

[40] Access Br. at 30-31 and Attachment A.

[41] Access calculated defendant's pre-tax overearnings by multiplying defendant's annualized rate of return by the number of years in the monitoring period and defendant's switched rate base. Access Br. at 31-32 and Attachment A.

[42] Access Br. at 31-32 and Attachment A.

[43] *Id.* at 32.

[44] *Id.* at Attachment B. This amount reflects interest from January 1, 1986. We note that Access, in its brief, claims interest from the day following the close of the monitoring period, January 1, 1987. We address this discrepancy in the discussion of damages section of this order.

[45] MTN Br. at 5, 7-9.

[46] *Id.* at 6-7 citing to *Southern Union Gas Co. v. F.E.R.C.*, 725 F.2d 99, 102 (10th Cir. 1984); *Nader v. FCC*, 520 F.2d 182, 198-99 (D.C.Cir. 1975); *Electrical Dist. No. 1 v. F.E.R.C.*, 774 F.2d 490, 492 (D.C. Cir. 1985); and *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

[47] MTN Br. at 9-10. MTN further contends that the rate of return of its parent, USWC, is already overstated to the extent that the Commission's rate base formula excludes certain prudently invested capital. Relying on *Illinois Bell I*, MTN claims a right to challenge the adequacy of the return established by the Commission in relation to the rate base formula. MTN RBr. at 4-5. MTN's reliance is misplaced. In *Illinois Bell I*, the D.C. Circuit remanded for further consideration, *inter alia*, the issue of whether non-cash expenses should be excluded from our determination of the cash working capital allowance. In the *Illinois Bell I Remand Decision*, we found that our cash working capital allowance was properly calculated. *See* 7 FCC Rcd at 299. Therefore, we find this argument to be an impermissible collateral attack.

[48] MTN argues that Access must specify an identifiable rate that Access paid that was too high or too low. MTN Br. at 10. In addition, MTN cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.* at 11, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). MTN's reliance on *Middlewest*,is misplaced. *See MCI Damages Order* at n.56.

[49] MTN Br. at 11-12. MTN contends that the principle that Access must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. MTN states that this ruling has been found applicable to proceedings under the Communications Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.35 (D.C. Cir. 1980) (*ARINC*), *cert. denied*, 451 U.S. 920 (1981). Here too, MTN's reliance on case precedent is misplaced. *See MCI Damages Order* at n.59.

[50] MTN Br. at 13-19. MTN argues Access must plead its case in equity and the Commission may only award "a refund/damages" if we find that the public interest will be served by such an

during the relevant period; and (iii) Access would receive a windfall that would be inconsistent with sound equitable principles.[51]

23. Finally, MTN argues that Access's calculation of damages is flawed in two ways. First, Access failed to include Switched Access Information and Intercept totals in its base damages calculation. Second, Access calculated and accumulated interest on a daily basis. MTN argues that these errors violate Section 65.703[52] of the Commission's Rules.[53]

24. Access counters that defendant's threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order* and the *AT&T Liability Order*, as has the defendant's argument that Access has not proven defendant's rates were unjust and unreasonable. Access states that the damages remedy is not "transformed into an automatic refund merely because the Commission's formula for ascertaining the total amount of an 'automatic refund' is similar to the method traditionally utilized in damages proceedings" to calculate damages due a complainant who paid excessive rates.[54] Access maintains that it has shown that defendant charged it rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that it paid.[55]

25. Access further argues that while equitable considerations are relevant to Section 204(a)(1) of the Act, they are not relevant to private complaints for damages because the Commission has no discretion in the award of damages under Section 206 of the Act.[56] Access reiterates that its claims are actions for damages, not for restitution or refunds.

26. Access next argues that defendant should not be allowed to offset underearnings in certain access categories against overearnings in other access categories, regardless of whether defendant violated the overall rate of return prescription. Allowing such an offset, Access argues, would render meaningless the category rate of return prescription, deny Access full relief, and permit cross subsidization.[57]

**b. Discussion**

27. *AT&T v. FCC and Ohio Bell:* The defendant's claim that the holdings in *AT&T v. FCC* and *Ohio Bell* control this proceeding and bar an award of damages to Access is without merit for the reasons stated in the *MCI Liability Order*. We emphasized in that Order that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[58] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[59] More to the point, we emphasized that "the [*AT&T v. FCC* ] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[60] Similarly, as we stated in the *MCI Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[61]

28. *Section 201(b) of the Act:* We turn now to the defendant's contention that Access's damages claim must be dismissed because Access has failed to prove defendant's rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendant violated our rate of return prescription.[62] Accordingly, the question before us now is not whether defendant's rates were unjust and unreasonable; rather the question now is whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

29. The defendant's next claim, that even if Access has sustained its burden and shown that defendant's rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels Access to establish what a just and reasonable rate would have been as a prerequisite to pursuing damages claims based on unreasonable rates,[63] has previously been discussed and rejected by the Commission. In the *MCI Damages Order* we reemphasized[64] the Commission's authority to prescribe and enforce carriers' rates of return, pointed out that the issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable, and agreed with the Bureau's determination in the *Discovery Order* that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the

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award to Access. MTN contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). MTN states that the refund inh)1*Moss* "was governed by the equitable principles governing the law of restitution." MTN Br. at 15, citing to *Moss*, 521 F.2d at 304. Once again MTN's reliance on the court's ruling is misplaced. *See MCI Damages Order* at n.60.

[51] MTN Br. at 17-19.

[52] 47 C.F.R. § 65.703.

[53] MTN RBr. at 5-6.

[54] Access RBr. at 8.

[55] Access cites to MCI's initial and reply briefs in File Nos. E-88-46S, E-88-44S, E-88-51S, E-88-54S to show that the measure of damages is the amount of overpayment and that the only proof it need produce is proof of the payment of unlawful rates. Access RBr. at 7.

[56] Access RBr. at 13.

[57] *Id.* at 12.

[58] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription.").

[59] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[60] *MCI Liability Order*, 5 FCC Rcd at 223.

[61] *MCI Damages Order* at para. 26.

[62] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See* 5 FCC Rcd at 226.

[63] MTN Br. at 10-11, citing *Middlewest*, 433 F.2d 212, 232.

[64] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd 222-23.

amount complainant paid for defendant's interstate access services and the amount it would have paid if defendant had charged rates that produced returns within the Commission's prescribed levels.[65] We said, "[i]t is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims."[66] Access has shown that it purchased services from defendant at rates that produced earnings over and above the defendant's prescribed levels. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie.

30. *Damages and Offsets:* The defendant's arguments are devoted primarily to attempting to persuade the Commission that Access's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendant, militate against any award of damages to Access based on excessive earnings. The defendant argues, in effect, that the damages Access seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendant's violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[67] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

31. In addition, we reject MTN's contention that a damages award to Access is precluded because it would drive USWC's overall rate of return below the minimum necessary to raise capital and to confiscatory levels. Assuming *arguendo*, that such an inquiry is relevant to a Section 208 damages claim, MTN has failed to provide sufficient record evidence for the Commission to assess the impact of any damages award upon USWC's overall interstate rate of return. While MTN has provided some data in Exhibit A to its brief,[68] these data made no clear showing of the amount by which an award to Access would reduce MTN's overall interstate earnings or rate of return let alone that any such reduction would be confiscatory. For the reasons stated in the *MCI Damages Order*, [69] we find MTN's other equitable arguments regarding the uncertainty surrounding tariff filings during the 1985-86 period and an alleged windfall to Access should it receive damages equally unavailing.

32. We reject Access's claim that the allowance of offsets would somehow repeal our rate of return prescription on a category basis. The issue of damages to a particular complainant is separate and apart from the validity and effect of our rate of return prescription. The determination we make here is the extent to which complainant suffered damage on account of defendant's violations of the rate of return prescription. The question of offsets is relevant to that determination and no other. However, MTN did not provide any specific calculations or claims for offsets in its brief or reply brief, although invited to do so by the Bureau in the *Discovery Order*.[70]

33. We reject MTN's arguments that Access's damages calculation is flawed because it does not comply with the refund calculation procedures found in Section 65.703 of the Commission's rules. As MTN itself has repeatedly reminded the Commission, the refund rule was invalidated by the D.C. Circuit in *AT&T v. FCC*.[71] Notwithstanding *AT&T v. FCC*, MTN cannot at once both deny the validity of a rule and invoke the rule for its own benefit. Additionally, we reiterate that the calculation in question is of damages, not of a refund. In any event, we reject, MTN's argument that Information and Intercept elements should be included in the calculation of MTN's rate of return in the switched traffic sensitive category. These items were not included by state on MTN's Form 492 and we will not allow adjustments to be made to those reported figures. As we discussed in the *MCI Liability Order*, the Form 492 is a final report and carriers may rely upon it.[72]

34. We have carefully reviewed the arguments and evidence presented by the parties, including the calculations provided in Exhibit A to MTN's brief. We find that Access has made a persuasive showing that it is entitled to recover the excessive amount it paid for MTN's overall interstate access service and that this amount totals $1,372 for the 1985-86 monitoring period. MTN, on the other hand, did not provide any specific calculations or claims for offsets in its brief or reply brief. We have previously rejected MTN's claim that it is entitled to offset its overearnings with the underearnings of affiliated carriers. MTN has not provided any evidence that would reduce or otherwise mitigate Access's damages claims based on MTN's excessive earnings in switched traffic sensitive category. Accordingly, we award damages to Access from Mountain States Telephone and Telegraph Company in the amount of $1,372. We turn now to Access's claim that it is entitled to interest on this damages amount.

**2. Interest on Damages Awards**

**a. Contentions of the Parties**

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[65] *MCI Damages Order* at para. 29.

[66] *Id.*

[67] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[68] Exhibit A contains a summary and compilation of information submitted in USWC's component operating companies Forms 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return.

[69] *MCI Damages Order* at para. 32.

[70] *See* 7 FCC Rcd at 3510.

[71] *See, e.g.*, MTN Br. at 7.

[72] *See* 5 FCC Rcd at 225, para. 78.

35. Defendant's final claim is that Access is not entitled to prejudgment interest should the Commission award damages to Access. MTN simply contends that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act. Because we cannot lawfully grant Access a refund, MTN argues, we may not award interest.[73]

36. Access disputes defendant's claim that it is not entitled to prejudgment interest at the rate specified in CC Docket 84-800. Access relies on the *Discovery Order* to show that the Commission has authority to award interest and that the issue remaining is whether interest is appropriate in this proceeding.[74] Access contends that an award of prejudgment interest is appropriate in the instant case because the damage liability was sufficiently certain at the close of the monitoring period and an award of interest is required to effectuate fully the statutory complaint remedy.[75] Access contends it is entitled to interest at the CC Docket No. 84-800 rate from January 1, 1986 through July 31, 1992 of $1,503 from MTN.[76]

**b. Discussion**

37. MTN's claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[77] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[78] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in this case. Access was effectively deprived of the use of the excessive amounts it paid MTN as a result of MTN's unlawful rates while MTN, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which Access rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for Access, which paid rates higher than it would have paid had defendant earned within the prescribed level, but also to avoid any unjust enrichment of defendant stemming from its charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[79] Access is wrong, however, in claiming that an award of interest necessarily flows from our decisions in the CC Docket No. 84-800 proceedings and, therefore, should be computed at the rate specified in those proceedings.[80] Just as the courts' decisions regarding the validity of the rate of return mechanism and refunds under Section 204 of the Act do not guide us in this Section 208 proceeding, we are similarly not bound by interest rate computations prescribed in CC Docket No. 84-800. We conclude that interest should be computed at the IRS rate for tax refunds, not at the rate Access requests.[81] In addition, we find that interest should begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, MTN was subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[82] from Mountain States Telephone and Telegraph Company to Access from January 1, 1987 until the date of full payment to Access.

## IV. CONCLUSION

38. We have carefully reviewed the extensive record before us and have found that complainant is entitled to an award of damages to the extent indicated here, plus accumulated interest on such damages amount, for Mountain States Telephone and Telegraph Company's violations of our rate of return prescription for the 1985-1986 monitoring period.

## V. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206, 207, 208, and 209, that Mountain States Telephone and Telegraph Company SHALL PAY to Access Communications, Inc. the sum of $1,372 (one

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[73] MTN Br. at 12-13.

[74] Access Br. at 25.

[75] *Id.* at 25-29.

[76] Access Br. at Attachment B. We note that Access calculated interest from January 1, 1986, but argued in its brief that interest should be calculated from the day after the close of the monitoring period--January 1, 1987.

[77] *See* MCI Telecommunications Corporation v. American Telephone and Telegraph Company, *et al.*, 94 FCC 2d 332, 343-46 (1983).

[78] *United States v. California Board of Equ a lization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[79] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[80] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987).

[81] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

79 FCC 2d at 238.

[82] The applicable IRS rates are set forth in Appendix A.

thousand three hundred seventy-two dollars) within 60 days after the release date of this Memorandum Opinion and Order.

40. IT IS FURTHER ORDERED that Mountain States Telephone and Telegraph Company SHALL PAY to Access Communications, Inc. interest on the damages awarded here computed at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

41. IT IS FURTHER ORDERED that the Motion for Acceptance of Late-Filed Pleading filed by Access Communications, Inc. on April 5, 1991 IS GRANTED.

42. IT IS FURTHER ORDERED that the Motion for Leave to Amend Complaint filed by Access Communications, Inc. on October 18, 1989 IS GRANTED.

43. IT IS FURTHER ORDERED that the Supplement to Motion to Dismiss filed by Mountain States Telephone and Telegraph Company on February 14, 1992 IS ACCEPTED for filing.

44. IT IS FURTHER ORDERED that the Application for Review filed by Access Communications, Inc. on March 7, 1991 IS DISMISSED as moot.

45. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Mountain States Telephone and Telegraph Company on November 22, 1989 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX A

| Effective Period | Rate | Internal Revenue Service Citation |
|---|---|---|
| 01/01/87 - 03/31/87 | 8% | Rev.Rul. 146, 1986-2 C.B. 208 |
| 04/01/87 - 06/30/87 | 8% | Rev.Rul. 87-23, 1987-13 I.R.B. 46 |
| 07/01/87 - 09/30/87 | 8% | Rev.Rul. 87-62, 1987-29 I.R.B. 10 |
| 10/01/87 - 12/31/87 | 9% | Rev.Rul. 87-87, 1987-36 I.R.B. 8 |
| 01/01/88 - 03/31/88 | 10% | Rev.Rul. 87-131, 1987-50 I.R.B. 6 |
| 04/01/88 - 06/30/88 | 9% | Rev.Rul. 88-17, 1988-10 I.R.B. 6 |
| 07/01/88 - 09/30/88 | 9% | Rev.Rul. 88-50, 1988-25 I.R.B. 39 |
| 10/01/88 - 12/31/88 | 10% | Rev.Rul. 88-86, 1988-41 I.R.B. 1 |
| 01/01/89 - 03/31/89 | 10% | Rev.Rul. 88-105, 1988-51 I.R.B. 4 |
| 04/01/89 - 06/30/89 | 11% | Rev.Rul. 89-36, 1989-1 C.B. 309 |
| 07/01/89 - 09/30/89 | 11% | Rev.Rul. 89-69, 1989-1 C.B. 310 |
| 10/01/89 - 12/31/89 | 10% | Rev.Rul. 89-99, 1989-2 C.B. 256 |
| 01/01/90 - 03/31/90 | 10% | Rev.Rul. 89-125, 1989-2 C.B. 257 |
| 04/01/90 - 06/30/90 | 10% | Rev.Rul. 90-19, 1990-1 C.B. 186 |
| 07/01/90 - 09/30/90 | 10% | Rev.Rul. 90-47, 1990-1 C.B. 187 |
| 10/01/90 - 12/31/90 | 10% | Rev.Rul. 90-71, 1990-35 I.R.B. 4 |
| 01/01/91 - 03/31/91 | 10% | Rev.Rul. 90-94, 1990-46 I.R.B. 16 |
| 04/01/91 - 06/30/91 | 9% | Rev.Rul. 91-20, 1991-11 I.R.B. 1 |
| 07/01/91 - 09/30/91 | 9% | Rev.Rul. 91-33, 1991-21 I.R.B. 1 |
| 10/01/91 - 12/31/91 | 9% | Rev.Rul. 91-50, 1991-37 I.R.B. 1 |
| 01/01/92 - 03/31/92 | 8% | Rev.Rul. 91-65, 1991-51 I.R.B. 1 |
| 04/01/92 - 06/30/92 | 7% | Rev.Rul. 92-21, 1992-14 I.R.B. 14 |
| 07/01/92 - 09/30/92 | 7% | Rev.Rul. 92-44, 1992-24 I.R.B. 86 |
| 10/01/92 - 12/31/92 | 6% | Rev.Rul. 92-77, 1992-38 I.R.B. 12 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-258**

In the Matter of

Implementation of Section 10 of the
Cable Consumer Protection and
Competition Act of 1992

Indecent Programming and Other Types
of Materials on Cable Access Channels

**FIRST REPORT AND ORDER**

**Adopted: February 1, 1993; Released: February 3, 1993**

By the Commission: Commissioner Marshall not participating.

## I. INTRODUCTION

1. Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub.L. No. 102-385, permits cable operators to enforce voluntarily a written and published policy of prohibiting indecent programming on commercial leased access channels on their systems.[1] Section 10(b) of the Act requires the Commission to adopt regulations that are designed to restrict access of children to indecent programming on leased access channels (that is not voluntarily prohibited under section 10(a)) by requiring cable operators to place indecent leased access programming, as identified by program providers, on a "blocked" leased access channel. On November 5, 1992, the Commission adopted a *Notice of Proposed Rule Making* in this proceeding, 7 FCC Rcd 7709 (1992), seeking comment on implementation of section 10(b) and related matters. This *Report and Order* adopts rules and regulations that implement section 10(b) of the Act and clarifies other aspects of section 10 related thereto.[2]

2. In the following paragraphs, we discuss the major issues raised by the comments and our conclusions with respect to those issues.[3] Before turning to specifics relating to the statute's implementation, we shall first address the general comments directed to the constitutionality of section 10 and to the adequacy of our *Notice* under the requirements of the Administrative Procedure Act, 5 U.S.C. §553.

## II. SECTION 10's CONSTITUTIONALITY

3. Many commenters challenge the constitutional validity of section 10 of the Cable Act. Alliance, for example, challenges the constitutionality of both section 10 and the Commission's proposed rule seeking to implement the section. Alliance believes that the statute is unconstitutional because it impermissibly restricts the first amendment rights of access programmers. Restrictions on indecent programming, according to Alliance, may not be applied to cable, unlike other media such as broadcasting, because cable subscribers are not "captive audiences" and, through cable technology, such subscribers have greater control over programming and information services than do either broadcast viewers and listeners or telephone subscribers. According to Alliance, the statute and proposed rule are constitutionally infirm because the lockbox approach, rather than blocking, is the least restrictive means to achieve the government's purported aims.[4] Finally, Alliance argues that the statute cannot be justified as necessary since it is underinclusive and does not affect indecent programming on channels other than those used for leased access.[5]

4. Many access organizations filed comments in support of Alliance's comments, although these groups' comments were primarily focused on section 10(c)'s provisions applicable to the public, educational, and governmental access channels. Cable operators, in turn, maintain that section 10 is unconstitutional as to them. For example, Cox Cable maintains that section 10(a) impermissibly "deputizes" cable operators as censors. Operators also assert that other provisions of the new Cable Act and of the 1984 Cable Act (upon which section 10's requirements rest) are constitutionally infirm because, *inter alia*, they impermissibly restrict cable operators' first amendment rights.[6]

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[1] Section 10(a) is self-effectuating and became effective December 4, 1992.

[2] The *Notice* also requested comment on regulations to implement Section 10(c) of the Act, relating to cable operator-imposed restrictions on obscene and other types of program materials on the public, educational, and governmental access channels. We shall adopt regulations that implement section 10(c) in a subsequent *Report and Order*.

[3] We received comments, informal comments, reply comments, and informal reply comments. Those comments or reply comments filed after the prescribed deadlines shall be treated as informal comments. A list of all the commenters in this proceeding is provided in Appendix A.

[4] As described in section 624(d)(2) of the Communications Act, a "lockbox" or parental key is a device that enables subscribers to prevent viewing of particular cable services within their homes during periods selected by them.

[5] Alliance also challenges the constitutionality of section 10(c) of the Act because, *inter alia*, it allows cable operators, if they choose, to ban programming containing sexually explicit materials and materials soliciting or promoting unlawful conduct even though such materials are protected non-obscene materials and even though they may not be indecent. As noted above, matters directly pertaining to section 10(c) shall be addressed at a later date.

[6] This view is advanced by many cable operators, e.g., TCI and Time Warner, and by both cable trade associations, NCTA and CATA. We do not address the constitutionality of other parts of the new cable Act as they are not directly at issue here and are not properly within the scope of the *Notice*.

**Discussion**

5. The courts have expressly recognized that activities of cable operators are affected with first amendment interests. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-495 (1986). Congress, aware of the authority on this subject, has concluded that the provisions in section 10 governing cable activities are legally permissible. We are obligated to execute and enforce the provisions of section 10(b) of the Act as enacted by Congress.[7]

6. Moreover, we believe the constitutional challenges raised by the commenters are without merit. In *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), the Supreme Court, in upholding a ban on obscene telephonic communications but striking down a complete prohibition on indecent telephonic communications, expressly stated that "[t]he Government may [] regulate the content of constitutionally protected [indecent] speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." As discussed below, we believe these principles are fully applicable to indecent programming on cable television and that the regulations we adopt to implement section 10 satisfy these requirements.

7. At the outset, it is evident that a compelling state interest underlies section 10 and the implementing regulations. The compelling interest under section 10 is to reduce children's exposure to indecent materials.[8] The Supreme Court has unequivocally stated that the government's "interest in safeguarding the physical and psychological well-being of a minor' is compelling," *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (*quoting Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982), and that "[t]his interest extends to shielding minors from the influence of [material] that is not obscene by adult standards," *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *see also FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978). In addition, as discussed below, Section 10(b) and our regulations implementing the blocking approach prescribed by Congress therein are the least restrictive means necessary to limit children's access to such programming.

**Permissibility of Regulating *In decent Cable Programming***

8. A principal attack raised by commenters as to why the blocking approach in section 10(b) is impermissible is that the characteristics of cable distinguish it from certain other media in which regulation of indecent material has been upheld. According to the commenters, the courts have concluded that cable's differing characteristics preclude all government regulation of indecent programming on the cable medium. More particularly, they point out that regulation of indecent programming has been justified in the broadcast context primarily on grounds that broadcasting is a "uniquely pervasive" medium in society and "uniquely accessible to children,"[9] whereas some federal courts have found that these characteristics do not apply to cable television.[10]

9. We note that each of the federal court cases cited by the parties invalidated state or local laws or ordinances that attempted to impose *complete* bans on indecent programming on cable systems. Section 10(b), in contrast, does not ban such programming but merely requires that indecent programming on leased access be placed on a single channel so that unrestricted access by children can be prevented. It does not in any way unduly prevent adults from viewing indecent cable programming. In addition, in each of the cited cases, the state or local prohibitions were found to be overly broad in terms of the content sought to be restricted and thus stand in stark contrast to the narrow definition of indecency we have proposed and shall adopt today.[11]

10. These cited cases were also decided prior to Supreme Court's decision in *Sable Communications v. FCC*, 492 U.S. 115 (1989), which clearly indicates that regulation of indecent speech is permissible even though the medium is not broadcasting and, therefore, does not necessarily fit the exact blueprint the Supreme Court applied in *Pacifica* to broadcasting. Thus, the Court has not concluded -- or even suggested -- that indecency regulations, similar to those applied to the telephone medium, cannot be constitutionally applied to cable television. As *Sable* and its progeny indicate,[12] regulation of indecent matter on other forms of expression is constitutionally permissible provided that it meets the "compelling government interest" test and is "carefully tailored."

11. Further, those federal decisionsthat have invalidated indecency prohibitions on cable have rested in part on the premise that "cable is not an intruder" into the home, but rather "an invitee whose invitation can be carefully circumscribed," e.g., by lockboxes. *See Community Television of Utah, Inc.*, 611 F.Supp. at 1113. These decisions thus do not suggest that the government is precluded from imposing regulations that are intended merely to enable customers to "tailor the invitation" even more carefully -- such as by blocking mechanisms designed to protect children in the home. Finally, even though cable is not now the universal service the telephone medium is, nor, as yet, as pervasive as broadcasting in our society, we note that over 60 percent of television households in this country now subscribe to cable.[13] As pointed out by

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[7] It is awell-rooted principle of law that "regulatory agencies are not free to declare an act of Congress unconstitutional." *See Meredith Corp. v. FCC*, 258 U.S.App.D.C. 22, 31 (D.C. Cir. 1987); *also Johnson v. Robinson*, 415 U.S. 361, 368 (1974) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies").

[8] Section 10(b) expressly commands the Commission to promulgate blocking regulations that are "designed to limit the access of children to indecent programming."

[9] *See FCC v.Pacifica Foundation*, 438 U.S. 726, 748-749 (1978).

[10] *See Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Wilkinson*, 611 F.Supp. 1099 (D. Utah 1985), *aff'd per curiam* 800 F.2d 989 (10th Cir. 1986); *Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164 (D. Utah 1982).

[11] *See also Home Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987 (D.Utah 1982) (statute prohibiting distribution by wire or cable any pornographic or indecent material to subscribers held unconstitutionally overbroad).

[12] *See Dial Information Services v. Thornburg*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 966 (1992) and *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991).

[13] Cable television is available nationwide to 89.4 million

Alliance, approximately 30 million of these homes are provided with an access channel. These figures will undoubtedly increase in the years to come. It would thus seem that blocking is a reasonable, appropriate means to protect the well-being of children in the substantial number of households that now subscribe to cable services. In our view, therefore, the decisions cited by the commenters do not render section 10(b) blocking *per se* unconstitutional.

**Least Restrictive Means**

12. The other principal attack raised by the parties is that even if government regulation of indecent programming on cable television is permissible, "blocking" as required under the statute is not the least restrictive means to achieve the government's compelling interest. Instead, in these commenters' view, the least restrictive and more effective means would be the existing lockbox approach authorized by Congress in section 624 of the Communications Act, which does not require that programming be identified by a program provider as indecent and placed on a single blocked channel. They believe that without record evidence that lockboxes are ineffective, other blocking mechanisms, alleged as more restrictive, cannot be adopted.

13. At the outset, we note that in *Dial Information Services v. Thornburg*, 938 F.2d 1535 (2nd Cir. 1991), *cert. denied* 112 S. Ct. 966 (1992), the court expressly held that "blocking" mechanisms authorized by section 223 and implemented by the Commission were the least restrictive means to achieve the government's compelling interest to reduce children's access to indecent communications on the telephone medium. In that case, the court reversed the district court because it had erred "in focusing on means, when the focus should be on goals as well as means" in its finding that "voluntary blocking of indecent telephonic communications was the least economically restrictive and therefore the most desirable means of regulation." *Id.* at 1542. The court emphasized that "the means must be effective in achieving the goal" and concluded that "[v]oluntary blocking simply does not do the job of shielding minors from dial-a-porn." *Id.*[14] A similar decision was reached by the federal appellate court in *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir.1991). Moreover, the courts in these and earlier cases were fully aware that voluntary approaches, similar in principle to the lockbox approach, were available to telephone subscribers who wished to preclude the use of their phones for outgoing calls to specific numbers. The blocking approaches adopted by the Commission were nevertheless specifically sanctioned as the least restrictive effective means to achieve the government's interest.[15] The blocking scheme upheld in these cases is, in all relevant respects, identical to that required by section 10(b).[16] Thus, we have no reason to question the constitutional permissibility of requiring blocking as a means to prevent children's access to indecent materials.

14. We further note that Congress itself has not suggested that a voluntary lockbox approach is the most effective means to prevent children's access to indecent programming. Even though under the 1984 Cable Act, Congress explicitly authorized a lockbox approach to enable subscribers to control access by others within their household to programs appearing on certain cable channels, it did not rule out the possible use of other methods. It merely stated, at the time, that section 624 provides "*one method* for dealing with obscene or indecent programming," H.R. Rep No. 934, 98th Cong., 2d Sess. at 70 (1984) (emphasis added), and said that this requirement "provides *one means* to effectively restrict" access to minors and others, *id.* (emphasis added). In section 10(b) -- just as it did in section 223 relating to "dial-a-porn" telephone services -- Congress has now determined that mandatory, not voluntary, blocking is essential in effectively protecting children from indecent programming on leased access channels.

15. We agree with Congress' conclusion that the voluntary lockbox approach is not likely to be as effective as cable operator-blocked channels. Moreover, we believe it may have other drawbacks. On leased access channels, for example, programs may come from a wide variety of independent sources, with no single editor controlling their selection and presentation. As a consequence, on these channels, indecent programming may be especially likely to be shown randomly or intermittently between non-indecent programs. Subscribers would thus be required to manually install, activate, and deactivate these devices in an attempt to avoid exposure of their children to such programming, and, even if children were carefully supervised, such attempts would not always be successful.[17]

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homes. Out of a total of 92.1 million television households in the United States, there are approximately 55.7 million cable subscribers. *Broadcasting* at 79 (Jan.11, 1993).

[14] The court was explicit in its rejection of the lower court's finding:

> "Even if voluntary blocking is assumed to be the least restrictive means of accomplishing the congressional purpose, it clearly is not an effective means.

938 F.2d at 1542.h

[15] *See Dial Information Services v. Thornburg*, at 1542 ("voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn billed by the telephone company"); *Information Providers' Coalition v. FCC*, at 873 ("The Commission concluded that voluntary blocking would not be an effective means of limiting minors' access to dial-a-porn services. We are satisfied that substantial evidence supports this finding and will not disturb it on review."). *See also Carlin Communications v. FCC*, 837 F.2d 546, 546 (2d Cir. 1988) ("The Commission bore its burden of showing that the compelling government interest in protecting minors from obscene telephone messages could not be served by less restrictive means. It adequately considered the feasibility and costs of customer premises blocking equipment").

[16] Under section 10(b), the cable operator, not the cable subscriber, is required to "block" access to the leased access channel carrying indecent programming just as, under section 223, it is the telephone common carrier, not the telephone customer, that is required to "block" access to telephone lines carrying indecent dial-a-porn messages. Moreover, just as under section 223, a telephone common carrier must in essence segregate telephone lines carrying indecent telephonic messages from others, under section 10(b), cable operators are required to segregate through use of a separate channel indecent leased access programming from the non-indecent programming.

[17] As the Supreme Court stated in *Ginsberg v. New York*, 390 U.S. 629, 639 (1962), parents and others "who have the primary responsibility for children's well-being are entitled to the support of laws designed to aid the discharge of that responsibility."

The alternative for such subscribers would be to attach the lockboxes on a permanent basis and to forbear receiving leased access programming entirely.

16. On the other hand, by separating indecent from non-indecent programming and the use of blocking mechanisms, the invitation of cable "as an invitee" can be more "carefully tailored." Subscribers can better protect their children and will not be required to forego entirely (for themselves and their children) receipt of all leased access programming simply in order to avoid possible exposure of children to indecent programming on these channels. The blocking approach thus enhances the rights of viewers to have access to leased access programming and the rights of programmers to reach their intended audiences.

17. In summary, we do not believe the blocking mechanism required by section 10(b) and incorporated in our rules, suffers from constitutional defects. Cable television, like the telephone and other services, may well be viewed as an invitee into an individual's home. Existing law, however, would not appear to preclude that invitee's invitation from being carefully tailored to ensure that the invitee does not overstep the bounds of its invitation in a harmful fashion.

**Alleged "Underinclusiveness"**

18. Alliance also contends that section 10(b) and the proposed implementing rule are unconstitutional because they affect only access channels and do not address the "entirety" of the problem of indecent programming in the cable medium. Thus, they contend, the claim that the blocking requirement is justified by a compelling interest is undermined, and, hence, the statute and rule are unconstitutional.

19. We disagree. As the Supreme Court recently has made clear, the first amendment imposes no "underinclusiveness" limitation but a "content discrimination" limitation upon the government's prohibition of proscribable speech. The purpose of the prohibition against content discrimination is to ensure that the government may not effectively drive certain ideas or viewpoints from the marketplace.[18] The section 10(b) blocking requirement, of course, does not proscribe speech at all, but merely requires that indecent programming be placed on channels that subscribers must request in order to obtain access. Thus, there is no danger that section 10(b) and our rule will drive ideas or viewpoints from the market.

20. Further, there is no basis for a conclusion that the statute is intended to protect only certain ideas or viewpoints or that official suppression of ideas is afoot.[19] Rather, Congress has determined that some restrictions on the subclass affected by the statute are justified because of the risk of harm to children from indecent programming. Congress thus has merely directed its attention to the specific area where a problem has been identified.[20] It was not required to legislate in other areas where no problem of similar degree or magnitude had been found. Given the evidence before Congress concerning the egregious nature of the problems associated with some leased access programming, legislative action was deemed appropriate.[21]

**Constitutionality of Section 10(a)**

21. In addition to challenging the constitutionality of the section 10(b) blocking approach, Alliance also asserts that section 10(a) is unconstitutional because it permits cable operators to ban completely indecent programming on leased access channels. Although Alliance recognizes that such complete bans are permissible by private parties, Alliance contends that access channels in fact are "public forums" and thus that government action has been taken that implicates the first amendment.

22. We are not aware of any federal decision, including those cited by Alliance, that have directly addressed the question or held that cable access channels are public forums as that term has been defined for the purpose of first amendment analysis. Moreover, the communications facilities and services used by cable operators to provide commercial leased access are analogous in function and purpose to those provided by communications common carriers. Similarly, we are not aware of any federal court decision that has held, upon constitutional grounds, that communications common carriers operate as public forums. To the contrary, existing case law has explicitly held that the activities of public utilities, such as telephone common carriers, do not constitute state action that would, for first amendment purposes, prohibit such carriers from engaging in content-based discrimination.[22] For similar

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[18] *See R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2545 (1992).

[19] *Id.* at 2547.

[20] Senator Helms stated that the purpose of these provisions is "to forbid cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels," noting that "leased access channels are not pay channels, they are often in the basic cable package." 138 CONG. REC. S646 (daily ed. Jan.30 1992). Alluding to a specific example of leased access in Puerto Rico, he pointed out that "[t]he situation is likewise out of hand in New York and other States," and read from one subscriber's letter in which she described how she and her daughter were subjected to "verbal and visual violation just by accidentally pushing the wrong button" and seeing "a couple engaged in oral sex." *Id.* We also note that, to the extent cable operators themselves may provide indecent or "adult" programming, such programming is more likely than not to be provided on per-program or per channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b).

[21] Congress, we note, is not prohibited from legislating restrictions directed to the most patently offensive programming, if it concludes that the risk of children's exposure to such materials is significantly greater on leased access channels than elsewhere. *Cf. R.A.V. v. City of St. Paul, Minnesota* 112 S.Ct. at 2546 (A state might choose to prohibit only that obscenity which involves the most lascivious displays of sexual activity).

[22] *See, e.g., Sable Communications v. FCC*, 492 U.S. at 131 (Scalia, J., concurring) ("[W]e do not hold that the Constitution requires public utilities to carry [dial-a-porn]"); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358-59 (1974) (carriers are private companies, not state actors); *Information Providers' Coalition v. FCC*, 928 F.2d at 877 ("a telephone carrier may [] ban 'adult entertainment' from its network"); and *Carlin Communications v. Mountain States Telephone and Telegraph*, 827 F.2d 1291, 1297 (1987), *cert. denied*, 485 U.S. 1029 (carrier is under no constitutional restraints in its policy of barring all "adult" entertainment from its 976 network). *Carlin* also disposes of Alliance's alternative claims that a cable operator's decision to ban indecent programming constitutes state action

reasons, we do not believe that the activities of cable operators when they engage in the provision of commercial leased access can be construed as constituting state action.

23. Therefore, to the extent that Alliance and the other parties' comments are directed at the constitutionality of the statute and our implementation thereof, they are rejected.[23] As noted above, in implementing these statutory provisions, we shall to do so in a manner that best protects the constitutional interests of all concerned.

### III. Compliance with Administrative Procedure Act (5 U.S.C. § 553) Requirements

24. Alliance maintains that the rights of the public have been prejudiced because the *Notice* and/or proposed rule fails to: articulate purposes that would be served by rule; present record evidence of the existence of a problem; present its reasoning on how the alleged problem would be remedied; include a complete description of subjects and issues involved; set forth standards describing the range of alternatives being considered with reasonable specificity; set forth any certification requirement in the proposed rule or a formulation of specific procedures to resolve access disputes or the blocking mechanisms or procedures that might be adopted. Alliance states that the Commission should issue a second notice of proposed rule making and allow a second round of comment. Although not objecting to the adequacy of the *Notice*, MPAA agrees that an additional round of comment is necessary in light of the "extraordinary constitutional delicacy of the issues at hand."

25. We disagree. The Administrative Procedure Act requires an agency to give advance warning of proposed informal rulemaking by publishing a notice containing "either the terms of substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3). The Act, however, "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule." *California Citizens Band Association v. United States*, 375 F.2d 43, 48 (9th Cir. 1967); *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314 (1980).Given the statutory constraints involved, we believe the *Notice* amply articulated the purposes intended to be served by the rule, *see* paras. 5-9 (limiting children's access to indecent programming) and provided the public an adequate description of the subjects and issues involved (*see* paras. 1-2 relating to "no censorship" and removal of cable operator immunity for obscene programming on access channels and paras. 13-14 relating to and ranging from interpretation of statutory terms to whether cable operator use of certifications would be appropriate). We believe that the *Notice* adequately set forth and elicited comment on the proposals relating to certification,[24] resolution of access disputes, and blocking mechanisms. Indeed, extensive comments on these and other issues were in fact submitted. Accordingly, we reject Alliance's arguments that the *Notice* did not comply with the APA.

### IV. Section 10(a) -- Implementation by Cable Operator of a Written and Published Policy of Prohibiting Indecent Leased Access Programming

26. Section 10(a) amends section 612(h) of the Communications Act, 47 U.S.C. §532(h), governing commercial leased access, to permit a cable operator to enforce a "written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

27. Cable operators contend that they should have broad discretion regarding the manner in which they implement section 10(a) of the Act.For example, Acton states that the operator should have broad discretion (including, for example, the right to prescreen) in selecting and enforcing its implementing policy and that a cable operator's decision should not be subject to challenge as long as its decision is based on a "reasonable belief" in accordance with the statutory language. NCTA submits that a cable operator should be able to prohibit programming under the "reasonable belief" standard if the operator's belief is based on its review of programming or the operator's receipt of certification from a programmer that the program is not indecent. CATA argues that, just as programmers are required under section 10(b) of the statute to notify the cable operator of indecent programming to be blocked, so too should they be required to notify the cable operator as to whether the program is indecent under section 10(a). TCI asserts that the absence of specificity in section 10(a) would appear to signal Congress' intent to afford cable operators' discretion to establish the form and manner of publication of their policies.

28. Denver Access, on the other hand, is concerned that too much leeway provided under section 10(a) will cause cable operators to curtail leased access programming because no standard of reasonableness is required for removal or attachment of conditions to leased access services. Indeed, Denver emphasizes that the self-effectuating provisions of section 10 (and presumably, how they are interpreted and/or enforced) are crucial to leased access program providers and, therefore, the Commission's role in overseeing this part of the statute is vital.

#### Discussion

29. We are convinced by the language of section 10(a), especially when read in conjunction with section 10 as a whole, that Congress intended to provide cable operators wide discretion to determine the manner in which they

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or an unlawful prior restraint simply because the cable operator potentially could face liability if it carries obscene programming. *See id.* at 1297 n.6 (the pressure of an obscenity law and resulting self censorship is not an unlawful prior restraint).

[23] Alliance and others also challenge the constitutionality of specific aspects of the statute or our implementation of them. We shall address these arguments below in the context of the specific provisions and requirements of the statute.

[24] The fact that certification is discussed in the *Notice* as a possible option but is not reflected in the proposed rule appended to the *Notice* does not, contrary to Alliance'sassertions, render the rulemaking proceeding invalid.

may enforce a policy of prohibiting indecent leased access programming, without involvement by this Commission. Section 10(a) expressly states that a cable operator's determination to classify programming as indecent should be based on the operator's "reasonable belief," thereby according the operator wide discretion. Furthermore, in conspicuous contrast to both sections 10(b) and (c), section 10(a) does not require, or grant specific authority to, the Commission to implement its provisions.

30. Moreover, it is clear that Congress did not wish under section 10(a) to compel cable operators to serve as government surrogates' and prohibit this type of programming on leased access channels. This is evident from the legislative history of the provision, which reveals Congress' explicit intention to ensure that the imposition of any such prohibition by cable operators would be voluntary, not mandatory, and its concern that cable operators not be compelled to act as involuntary government surrogates.[25] The legislative history thus makes clear that cable operators are free to decide whether to prohibit indecent programming on these channels -- the very same freedom they enjoy with respect to the other channels not subject to access requirements.

31. Cable operators thus need not prohibit indecent programming but are free to ban such programming on their leased access channels as long as they have a written and published policy and, in enforcing any such prohibition, exercise their reasonable belief about which programming is or is not indecent. Section 10(a) would also appear to permit cable operators to adopt any measures appropriate for implementation including, but not limited to, the requirements we adopt under section 10(b), subject to the caveat in section 612(c)(2) that prohibits them from exercising editorial control over leased access programming in any other respects.[26] Further, some cable operators suggest that cable operators have the discretion to prohibit some, but not necessarily all, indecent programming under section 10(a) as long as they block the rest under section 10(b). Given the wide discretion Congress afforded cable operators under this section, we see no reason to dispute this interpretation.[27] Because Congress appears to have deliberately omitted any role for the Commission in the implementation of this particular provision of section 10 and because programmers are otherwise allowed, under existing statutory provisions, to enforce their rights to commercial leased access in federal district courts,[28] we conclude that the courts, rather than this agency, are the appropriate forums for resolution of any disputes concerning whether cable operators have properly denied access pursuant to section 10(a).

### V. Section 10(b)--Implementation of Blocking Requirement Applicable to Indecent Programming

32. Section 10(b) amends section 612 of the Communications Act of 1934 (47 U.S.C. §532) by adding new subsection (j)(1) which requires the Commission to promulgate regulations designed to: limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by --

> (A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;
>
> (B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and
>
> (C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

Subsection (j)(2) requires cable operators to "comply with the regulations promulgated pursuant to paragraph (1)." Thus, this provision requires cable operators to place indecent programming, as defined by the Commission, and as identified by program providers, on a single channel and to block access to this channel unless the subscriber affirmatively requests access to the channel in writing. In the paragraphs below, we discuss implementation of the various components of this provision.[29]

#### A. Definition of "Indecent Programming"

33. Congress set forth in section 10(a) a definition of indecency to be used by cable operators that voluntarily choose to prohibit indecent programming on the leased access channels. The statutory definition is virtually identical to the Commission's generic definition of indecency and differs only insofar as we have tailored the definition to the particular medium involved.[30] In the *Notice*, we pointed out that, unlike in section 10(a), Congress in section 10(b) delegated to the Commission the

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[25] Senator Helms, author of this amendment, emphasized that cable operators' actions prohibiting indecent material on leased access channels "is not governmental action" but rather "action taken by a private party." 138 CONG. REC S646 (Remarks of Senator Helms daily ed. Jan.30, 1991). He further pointed out that the "pending amendment merely gives cable operators the legal right to make that decision" but "does not require cable operators to do anything." *Id.* Even though the view of a sponsor of legislation is by no means conclusive, the Supreme Court has indicated that it is entitled to considerable weight, particularly in the absence of a committee report. *North Haven Board of Education v. Bell*, 451 U.S. 512, 526-527 (1982).

[26] Thus, a cable operator who makes its written policy available to users on request, places it in its public file, and furnishes it to the franchise authority would appear to satisfy the requirement of having a "written and published policy," as Blade Communications suggests. Similarly, this provision would not appear to preclude cable operator reliance upon a user's certification as the basis for its "reasonable belief," as NCTA suggests. *See* discussion at para. 50 and note 42, *infra*.

[27] *See also* para. 43, note 39, *infra*.

[28] *See also* subsections 612(d) and (e)(1).

[29] Many of the parties submitted comments concerning which persons or entities should be required to bear the costs and expenses under the cable operator-imposed policy under section 10(a) as well as those costs and expenses arising from implementation of blocking mechanisms under section 10(b). We believe these issues are more appropriately addressed in the cable rate regulation proceeding in *Notice of Proposed Rulemaking in MM Docket No. 92-266*, FCC 92-544 (adopted December 10, 1992; released December 24, 1992), and thus will be taken up therein.

[30] Senator Helms, author of section 10(a), pointed out that "[t]his definition is exactly the same as the FCC definition." 138 CONG. REC. S646 (Remarks of Senator Helms daily ed.

task of defining an indecency standard for programming that programmers must identify and cable operators must block.

34. We proposed, for the purpose of implementing section 10(b), to use the definitional language of section 10(a) -- i.e., indecent programming would be defined as programming "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." We noted that this language is patterned after the generic definition of indecency found in the standards we have applied to broadcasting and the telephone medium.[31] Just as we have previously tailored our indecency standard to the specific medium involved, we asked whether we should make the definition specifically applicable to the "cable medium."

35. Many of the commenters state that, if the Commission decides that an indecency standard is applicable to cable, the Commission's proposed definition would be appropriate since it would comport with the indecency definition in section 10(a) and parallels the Commission's other indecency definitions. This is particularly important, according to NCTA, because, if the Commission's definition under section 10(b) were broader than that under section 10(a), then the cable operator would be in the "untenable" position of being forced to block programming which it is not able to prohibit under section 10(a).

36. In addition, NCTA and others believe that the Commission should tailor its standard to the "cable medium" because such a step would minimize difficulties by giving the term a narrow definition. Relating to this question, Blade Communications states that the definition should be refined by stating that the relevant community for cable should be cable subscribers and, indeed, further suggests that the definition should be further refined to subscribers of a particular tier or channel. Time advocates adoption of a community standard that is based on the "average cable subscriber" on a nationwide basis, as the Commission has done on the broadcast side. In addition, it states that material should be judged within the context of the whole program and that merit of the work should be considered. Intermedia states that if the Commission is to make the definition workable, it must establish a national standard that preempts state prosecution of programmers and operators. Many of the reply commenters reiterate the importance of adopting a nationwide standard based on the "average cable subscriber."

**Discussion**

37. We shall adopt our proposed definition of indecent programming. As we pointed out in the *Notice*, the Supreme Court stated in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978), that "each medium of expression presents special First Amendment problems." Our definition thus shall be suitably tailored to include reference to the cable medium, just as our generic definition has been adjusted to other media. In addition, we agree with Time that the standard should be based on the "average cable subscriber,"[32] just as our indecency standard for broadcasting is based on the "average broadcast viewer or listener."[33] In addition, for purposes of our definition, "average cable subscriber" shall mean the "average subscriber to cable television," rather than the average subscriber to a particular cable system or average subscriber in a particular locality."[34] Keeping in mind that the purpose of "indecency" regulation is to protect children from exposure to such materials, we believe that this interpretation, not confined to a specific geographical area or specific cable system, is reasonable and appropriate.[35]

38. We do not agree that any determination of indecency made under the standard is required take into account the work as a whole. As the court in *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) stated, "some material that has significant social value may contain language and descriptions as offensive . . . as material lacking such value." Thus, while "merit is a relevant factor in determining whether material is patently offensive," it "does not render such material *per se* not indecent," since the object sought is to reduce the risk of children's exposure to such materials. *Id.* Of course, as we have reiterated on many occasions, "context" is an important factor of the indecency equation and, to the extent that the overall work as a whole is relevant to the question of "context," it will be considered. [36]

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January 30, 1992). He further added that the term indecent had recently withstood constitutional challenge in the *Dial Information Service* case because the court held that it was "sufficiently defined to provide guidance to the person of ordinary intelligence in the conduct of his affairs.'" *Id.* (citation omitted).

[31] *See Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 936 n.6 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) and *Dial Information Services v. Thornburg*, 938 F.2d 1535, 1540-1541 (2d Cir. 1991).

[32] We decline to adopt Blade Communications' proposal that application of the indecency standard should also take into account particular tiers of service on the cable system. We agree with Alliance's contention in its reply comments that such an approach would be "unworkable" and that access channels may be available on different tiers.

[33] *See Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 933 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[34] This approach was strongly supported by the commenters.

[35] On the broadcast side, we have noted that the Supreme Court does not require, as a constitutional matter, the use of any precise geographic area in evaluating obscene or indecent material, *Hamling v. United States*, 418 U.S. 87, 104-05 (1974), and we have stated that "the determination reached is not one based on a local standard, but one based on a broader standard for broadcasting generally." *Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd 930, 933 (1987), *remanded on other grounds Action for Chil dren's Television v. FCC*, 852 F.2d 1332 (1988). We believe that similar considerations are applicable here.

[36] *See, e.g., Infinity Broadcasting Corp., supra.*

### B. Identification by Program Providers of Indecent Programming

39. Section 10(b) directs the Commission to adopt regulations that require cable operators to block access to indecent programs "as identified by program providers." In the *Notice*, we noted that it is the program provider, not the cable operator, who must determine if a program is indecent and, therefore, must be placed on a blocked channel. We pointed out that the cable operator is prohibited under section 612(c)(2) of the Communications Act from exercising editorial control over the leased access channels (unless under section 10(a) of the new Act it enforces a written and published policy that prohibits indecent programming). We expressed the view that, under these provisions, (and in the absence of a policy authorized by section 10(a)), the cable operator might not have the power to require placement of indecent programming on the blocked channel if the program provider fails to identify the program as indecent or fails to notify the cable operator to that effect.

40. Most commenters, primarily cable operators, agree that producers or programmers should have primary, if not the sole, responsibility to identify programming since they have the best knowledge of the programming. NCTA and several cable operators state that cable operators should not be responsible for the underlying content of such programs but only for failure to block if proper notification is given, unless the operator has actual knowledge that the program is indecent. Others, such as Intermedia, state that because cable operators are also liable for obscene programming, they should be permitted to review or prescreen if they so choose. MPAA, in reply comments, states that lessees should be permitted, but not required, to provide written notice of any programming they believe may be found to be "indecent" by simply requesting carriage on a "blocked" channel.

#### Discussion

41. The legislative history to section 10 indicates clearly that Congress deliberately chose to pattern this section on the statutory scheme applicable to information providers of indecent materials over common carrier telephone facilities. Senator Helms, the amendment's author, stated that "this [blocking scheme] is precisely the same method that Congress used to block dial-a-porn lines" and has been upheld against constitutional challenge.[37]

42. Under the telephone blocking scheme upon which section 10(b) is based, it is the information provider, not the telephone common carrier, that is required to identify whether the information to be transmitted is indecent. *See Report and Order in the Matter of Regulations Concerning Indecent Communications by Telephone Gen. Docket No. 90-64*, 5 FCC Rcd 4926, 4931 (1990). In adopting implementing regulations in the telephone context, we expressly stated that such a requirement imposes merely a minimum burden on the information provider and obviates the need for the carrier to monitor the communication.[38]

43. Similarly, the statutory language of section 10 expressly requires the program provider, not the cable operator, to identify whether a program is indecent and therefore is subject to the blocking requirement. Given this statutory directive, we do not believe section 10(b) requires cable operators to prescreen or review programs on the leased access channels for this purpose.[39] Cable operators thus will not be held liable under section 10 or our rules for their failure to block programming where program providers have failed to provide the required identification of programming that is indecent. Moreover, given the explicit statutory language requiring programmer identification as a prerequisite to the cable operator's blocking obligation (which signifies Congress' clear intention to limit the responsibility of cable operators), a cable operator will not be subject to liability under section 10(b) even if it has a contrary belief that a program not identified by a program provider is indecent. As discussed in para. 75, *infra*, programmers who violate our rules by failing to identify indecent programming will, of course, be subject to appropriate sanctions.

### C. Certification

44. In the *Notice*, we asked, in conjunction with the identification requirement, whether a cable operator can require program providers to certify that their programming is not indecent or obscene. We assumed that all cable operators could require program providers to certify that their programs do not contain obscene materials.[40]

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[37] *See* 138 CONG. REC. at S646 (daily ed. January 30, 1992).

[38] As noted above, the statutory scheme that governs indecent telephone communications was upheld against constitutional challenge in both *Dial Information Services* and *Information Providers' Coalition*. In the latter case, the court rejected a claim that the indecency identification requirement is an impermissible "prior restraint," stating that "labelling matter as indecent under the statute or regulation does not inhibit its dissemination one iota." 928 F.2d at 878. The court further stated that if regulation of indecent matter is constitutionally permissible, "it inexorably follows that for some regulation of indecent speech to occur, the speech must be identified as indecent." *Id.*

[39] Similarly, we do not believe that section 10(b) itself authorizes cable operators to prescreen. Cable operators may, if they choose, prescreen programming as a means to enforce any cable operator policies adopted under authority of section 10(a). Further, we believe that cable operators with policies prohibiting indecent programming have, under section 10(a), the discretion to block any such programming, rather than banning it completely, and, moreover, they may provide such programming on blocked channels during time periods of their own choosing. In addition, wholly apart from the provisions of sections 10(a) and 10(b), we think thatprescreening by cable operators cannot be prohibited in light of the amendment to section 638 that removes a cable operator's statutory immunity for obscene programs on cable access channels. As noted *infra*, however, we believe that cable operators that do not prescreen, and thus do not have actual knowledge of any obscene programming on leased access channels, are otherwise immune from prosecution for violations of obscenity laws.

[40] As we pointed out in the *Notice*, section 10(d) of the new Cable Act removed cable operators' statutory immunity under federal, state, and local laws for "programming involving obscene materials" on access channels. We agree with Alliance to the extent that it suggests that the language in section 10(d), if read literally, may be too broad to satisfy constitutional standards. The language in 638 should thus be construed to remove immunity only for provision of programming that is unprotected by the first amendment.

45. The majority of commenters supported use of a certification procedure, although some differed as to details that should apply to this process. Other commenters were concerned that requiring certifications could discourage or curtail presentation of live programming on access channels. To alleviate such concerns, NATOA urged the Commission to allow programmers of live formats to certify that they have exercised "reasonable efforts" to ensure that their programs will not contain obscene or otherwise proscribed material. Acton, TCI and Time believe that NATOA's suggestion is reasonable. Some cable operators favor a certification process because it is the least intrusive means of implementing section 10(b). For example, Continental Cablevision argues that, without certification, operators will be forced to adopt a written and published policy and, if so, this could lead to a *de facto* ban on indecent programming. Other cable operators who favor certifications argue that their use should not preclude operators from prescreening or otherwise monitoring programming on the leased access channels.

46. Denver Access, one of the few to express reservations about a certification process for leased access use, argues that certifications can be used in a highly and unnecessarily repressive manner and, therefore, the FCC should permit certifications only under conditions it prescribes and monitors. NATOA states its support for a certification system because it believes that cable operators should not be permitted, much less required, to censor programming. MPAA, in its reply comments, states that lessees should not be required to "certify" that programming is "indecent but, as noted previously, merely request carriage on the blocked channel.

47. Cable operators state that they should be released from liability for carriage of leased access indecent or obscene programming where a programmer has certified that the programming is not obscene or indecent. However, they differ as to the precise form of nonculpability that should attach. For example, some suggest no liability at all in such cases and, therefore, no prosecution at the federal, state, or local level. Others suggest that an affirmative defense should be available or that common law defenses should be available to operators. For example, TCI asserts that there should be an irrebuttable presumption of no knowledge by an operator if a programmer certifies that programming is not indecent or obscene because Congress clearly removed from cable operators an obligation to make independent judgments about programming.

48. Cable operators thus suggest that they should not be held liable for the underlying content of the programs but only for their failure to place programming on blocked channels upon receipt of proper notification. They are almost unanimous in their views that unless they are protected by a certification process, they will be forced to prescreen and censor programming on the leased access channels. Some also suggest that they should have the right to prescreen even if a certification process is adopted, since they are now liable for carriage of obscene materials. Others suggest that they should be permitted to impose reasonable conditions on carriage of programming on leased access channels, including indemnification provisions. Some assert that they should be permitted to deny carriage to a program provider whose certification was false and some maintain they should be permitted to assess monetary penalties. In their view, those who refuse to certify should be denied access.

49. On the other hand, Alliance maintains in reply comments that certification is not necessary to insulate operators from liability, even for obscene programming. Rather, the Commission should state in its final rule that no liability will attach to an operator if a programmer violates both the Commission's rule (by failing to identify indecent programming) and an operator's policy against indecent programming. According to Alliance, there is "simply no need for the Commission to require that programmers certify the content of their programs." As to obscene programming, Alliance points out that, in accordance with Commission precedent governing MDS common carriers, no liability should attach for that programming either, unless a cable operator had actual knowledge that the programming has been adjudicated obscene. In addition, it maintains that a certification requirement might very well be considered vague and, therefore, incapable of withstanding first amendment scrutiny, to the extent that it can be likened to an oath and has the effect of chilling speech by forcing self-censorship. Along this line, MPAA, in reply comments, states that requiring program providers to "certify" in writing would violate the Constitution's fifth amendment.

**Discussion**

50. As indicated above, we think that cable operators can use certification procedures as a means to enforce any policies prohibiting indecent programming that may be established under section 10(a). We further believe that requiring certification is'(0* ( (permissible under section 10(b). We will, therefore, permit cable operators to require certification of program providers relating to both indecent and obscene programming on the leased access channels.[41] Although some commenters state that certification would be burdensome and would serve as a further deterrent to those seeking to use these access channels, we believe that a relatively simple, straightforward certification requirement need not have either of these deleterious effects. Further, certification serves as a reasonable means to avoid any questions that might otherwise arise concerning a cable operator's potential liability under our rules and section 10(b) for failure to block indecent programming identified by program providers. In addition, such a requirement is reasonable since cable operators are no longer statutorily immune from liability for obscene materials carried on leased access channels.[42] We thus believe this approach

[41] Certification does not remove a cable operator's independent right to prescreen, as addressed in note 39, *supra*.

[42] We agree with Alliance, that under prevailing law, cable operators should be held immune from liability where they do not have actual knowledge of leased access use for carriage of obscene programming. Permitting a certification requirement would further assist a cable operator in defending against any potential prosecution. We also believe that Congress, through enactment of section 10, clearly intended that its legislative scheme would prevail over any state or local laws that attempted to prohibit or otherwise regulate indecent programming on leased access channels. Even prior to enactment of section 10, section 612 of the Communications Act was expressly held to preempt state law that prohibited indecent programming on these channels. *See Community Television of Utah v. Wilkinson*, 611 F.Supp. 1099, 1103 (D.Utah 1985), *aff'd*

strikes an appropriate balance between the cable operator's rights and obligations under section 10(b) and (d) and the access provisions of section 612(c)(2).

51. Accordingly, we will allow cable operators to require program providers to certify that their programming is not obscene or indecent or, alternatively, to identify the programming that ish indecent and required to be blocked.[43] Further, a program provider that does not provide a requested certification for its programming will not be entitled to leased access. As suggested by NATOA and endorsed by others, program providers of live programming will be permitted to certify that they have exercised reasonable efforts to ensure that their programs are not obscene (or indecent if provided on a non-blocked channel). As stated above, where a program provider's certification that its program is not indecent is erroneous and the program is not blocked out by the cable operator, the cable operator will not be in violation of our rules and the statute.[44]

### D. Basic Requirements

#### 1. Contents of Certification

52. Commenters suggested different approaches regarding implementation of acertification process. Some argue that the FCC should specify the form or the content of the certification that may be required of the programmer. New York State states the Commission should require more than a conclusory statement by program providers. TCI suggests that the Commission should allow certification procedures to be handled contractually by the parties. Commenters generally said that certification should be in writing.

#### Discussion

53. We decline to specify the precise wording that should be contained in a requested certification. However, for purposes of qualifying as a certification under our rules, we shall require that the certification be made in writing by the program provider. Certification must be made by the person or entity assuming responsibility for the program's content. Thus, certification by an access organization or entity responsible for management of the commercial leased access channels is sufficient if that organization or entity assumes responsibility for the content of the programs intended for commercial leased access. Further, the certification should include the full name, address, and telephone number of such person. We will not require a separate certification for each program.

#### 2. Advance Notice

54. In the *Notice*, we asked for comment "on what would be a reasonable time frame for the required notification by a program provider to the cable operator . . ." We proposed in our rule a seven day advance notice requirement.

55. Commenters differ on what would be a reasonable period for advance notification. Acton suggests a one week period. MPAA, in reply comments, however, states that seven days notice should be the "absolute maximum." Others suggest longer periods ranging from 14 days to 60 days. Time, on the other hand, believes notification should be made at the time of contracting for access. New York State argues, however, that a single, fixed notice period for each program might constitute an unconstitutional burden on the right of leased access programmers and, therefore, a more general, flexible approach might be suitable.

#### Discussion

56. We believe that a maximum of thirty days advance notice prior to the access user's requested time for leased access should be adequate to enable cable operators to comply with the blocking requirement.[45] In our view, a thirty day time period appropriately balances the interests and needs of leased access users and cable operators. We are aware of the desire of some cable operators to have a longer time period in order to prepare cable viewer guides. We believe, however, that a sixty day time frame is too long. Our rule will not, we emphasize, prohibit leased access users from providing earlier notification, especially if they wish their programming to be published in monthly

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*Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). With section 10's enactment, it is even more clear that Congress intended that the clearly defined scheme in section 10(b) should prevail and thus preempt any state laws that otherwise might govern indecent programming on access channels. We therefore interpret section 10(b) of the Act as immunizing cable operators and programmers from liability for indecent programming where they have complied with the section 10(b) requirements.

[43] We do not believe that any certification requirements imposed by cable operators impermissibly violate program providers' rights under the first amendment, as Alliance maintains, or the fifth amendment's "self-incrimination" clause if required in writing, as MPAA contends. Moreover, even assuming some state action were involved, requiring a certification would not constitute a prior restraint on speech and thus would not implicate any first amendment concerns. *See Information Providers' Coalition v. FCC*, 928 F.2d at 878. At the outset, we note that our rules will not require cable operators to use a certification procedure, but simply will permit them to do so. Further, program providers do not incriminate themselves by certifying that their programming is not obscene or indecent. Nor do they do so by identifying programming that is indecent for purposes of its provision on blocked channels, as they face no potential liability under state or federal law for the provision of indecent programming on blocked channels. *See* note 42, *supra*, concerning preemption of state laws governing indecent programming on blocked channels.

[44] Further, as indicated in note 42, *supra*, such cable operators (or programmers) in compliance with section 10(b) are not subject to state laws regarding indecency, which are preempted by the Cable Act's explicit provisions governing indecent programming. Further, where a certification is erroneous, we believe cable operators would also be immune from potential liability under obscenity laws. *See* notes 39 and 42, *supra*.

We will not deny cable operators the right to request indemnification from leased access users for the cost and expenses attributable to defending a prosecution for carriage of an alleged obscene program, certified otherwise by a leased access provider. Notwithstanding some commenters' contentions, this is a reasonable term and condition relating to use of leased access channel capacity in light of the removal by Congress in amended section 638 of cable operator immunity for carriage of obscene programming.

[45] A cable operator will, of course, be free to adopt a shorter advance notification time frame if it so chooses.

viewer guides that cable operators provide to their subscribers. Moreover, we are aware that a specific time slot requested may not be available and, therefore, alternative air dates or arrangements may have to be made. In such circumstances, no further notification from the program provider shall be required. We decline to adopt Time's suggestion that notification should be made at the time of contracting since that proposal may unreasonably hamper the flexibility of program providers committed to leased access use over extended periods of time. For the present, a thirty day prior notice requirement seems reasonable. If we later find that this approach is too burdensome for either program providers or cable operators, we can alter it accordingly.

**3. Record Retention Requirements**

57. We sought comment in our *Notice* on whether "a cable operator should be required to retain notifications for a prescribed period of time."

58. Blade Communications argues that cable operators should not be required to retain notifications any longer than the applicable statute of limitations. Cox Cable, however, argues that notifications should not be kept any longer than three or four months while NCTA argues that there should be a short retention period as well as short period for filing complaints under section 612, as amended under the new Cable Act, which provides procedures for expediting disputes relating to leased access. Time argues for an eighteen month period which it states is consistent with other record retention requirements, e.g., section 76.225(c) relating to recordkeeping for commercial limits in children's programs. New York State points out that it requires the entity administering its other access channels to retain records for a two-year period.

**Discussion**

59. We shall require cable operators, consistent with our other cable recordkeeping requirements, to retain copies of program provider identifications and/or certifications for eighteen months from the date of receipt. This will ensure that such information will be available should any disputes arise under section 10(b) or related leased access provisions. As mentioned earlier, the notification or certification shall apply to the leased access user but need not specifically mention each program as long as the access user's notification or certification covers all of the programming intended to be carried on commercial leased access. Program providers will also be required to renew their certifications prior to the expiration of the eighteen month period for programming intended to be shown after that date.

**E. Blocked Indecent Leased Access Programs**

**1. Blocking Mechanisms and Subscriber Access**

60. As noted above, section 10(b) specifically requires cable operators to place all indecent programming on a single leased access channel and to block access to that channel unless the subscriber requests access in writing. In the *Notice*, we stated that "[o]ur proposed regulations would codify these statutory requirements" by requiring cable operators to place such programming "on a single leased access channel, employ appropriate blocking mechanisms, and permit access only if the subscriber so requests in writing." We specifically asked commenters for relevant suggestions or comments "concerning appropriate blocking mechanisms and procedures relating to subscriber access."

61. Cable operators are almost unanimous in holding that the Commission should not prescribe a required method of blocking but should allow maximum flexibility as long as it is effective. Such methods should include scrambling, interdiction (by positive or negative traps), or lockboxes. In addition, Cox Cable states that the cable operator should not have to provide more than one blocked channel. In the same vein, Acton maintains that cable operators should be able to deny carriage if the blocked channel is full, while Time states that the cable operator should be allowed to provide more than one blocked channel if it chooses.

62. MPAA argues, in reply comments, that the Commission should take an expansive view of the "single" channel requirement by not limiting it to a 6 MHz channel standard but should interpret the statute to allow cable operators to provide such programming on multiple compressed channels. Acton also argues that the blocked channel obligation should only arise if an operator chooses to carry indecent leased access programming. TCI maintains that the cable operator should not be required to set aside a channel in advance. Acton also maintains that programmers offering indecent programming should not have a right to insist on the blocked channel option.

63. Acton further states that cable operators should not be required to block the channel on a twenty-four hour per day basis. Many other cable operators similarly state that they should not be required to block more channel capacity than necessary, i.e., the rest of the blocked channel should not be "warehoused" for indecent programming. For example, Continental Cablevision says that many cable systems cannot afford to devote two channels for leased access programming that would otherwise fit on a single leased access channel. It further states that cable operators should be allowed to aggregate and scramble all indecent leased access programming on a single channel. Time argues that, in addition to being allowed to block only during indecent programming, cable operators should be able to limit periods for indecent programming and to choose time slots, and that programmers should not be permitted to change their minds during the contract period requiring channel placement changes. Cox Cable argues that cable operators should not be required, as part of the blocking obligations, to market blocked programming.

64. As for subscriber access, TCI says that the FCC should allow the cable operator to use any reasonable method to notify subscribers about the blocked channel. NCTA believes that subscribers should have sufficient time to request access to that channel in writing and that cable operators should have additional time to unblock that channel for interested subscribers. It therefore states that cable operators should have sixty days to notify subscribers (as well as to establish the channel) from an initial request for airing indecent leased access programming and, thereafter, a minimum of thirty days' notice to satisfy requests for blocking of service. Alliance maintains that subscribers should be able to request unblocking of a blocked channel by telephone after the subscriber has mailed the cable operator a written request and that the Commission should prescribe the form of the request and ensure that the cable operator protects the subscriber's privacy.

**Discussion**

65. We shall allow cable operators to employ any blocking mechanism that they choose -- scrambling, interdiction or any other method, as long as it is effective.[46] We agree that cable operators should not be required to block a leased access channel to be used for carriage of indecent leased access programming until they receive a request for carriage from a provider of indecent programming.[47] Similarly, cable operators should be allowed to use the channel for other non-blocked leased access programming to the extent it is not being used for indecent programming.[48] Thus, we will require that the channel be blocked only during those time periods that indecent leased access programming is being shown.

66. We disagree with those commenters who suggest that cable operators should be permitted, on blocked channels, the additional flexibility to "channel" such programming by scheduling it only at late hours of the evening or other times when children are least likely to be viewing. As we stated in the *Notice*, "[i]nstead of this type of 'safe harbor' approach" that has been applied to broadcasting, Congress appears to have "deliberately chosen" a 'blocking' approach, similar to that under section 223 for indecent telephonic communications.[49] We do agree with Time that cable operators should be permitted, if they so choose, to provide an additional blocked leased access channel for indecent programming if the first channel becomes full.[50]

67. We decline to specify the form of notification about the availability of a blocked channel that cable operators should give to subscribers but we shall require that the subscriber's written request to receive the channel contain a statement that the subscriber is at least eighteen years of age. Cable operators will be required to "unblock" the channel within thirty days after receipt of a written subscriber request. Because it appears contrary to statutory intent, we decline to adopt Alliance's suggestion that "unblocking" should be permitted by telephone call if the subscriber has notified the cable operator in writing to activate his or her ability to have the block lifted. We believe that mere telephonic confirmation is insufficient to ascertain that the recipient is, in fact, at least eighteen years of age.

**2. Time Period for Implementation**

68. We did not specify or recommend in the *Notice* a specific time frame by which cable operators would be required to implement the blocking and associated requirements of section 10(b). Most cable operators argue that a time frame of 180 days following adoption of final FCC rules should be set to allow cable operators sufficient lead time to equip themselves and their customers in order to comply with the new requirements. Additionally, Time advocates that non-addressable cable systems be allowed ten years if they use lockboxes. Cox Cable urges cable operator compliance within 180 days following receipt of a first notification of request for carriage of indecent leased access programming. TCI states that cable operators should be afforded a reasonable time to comply but does not specify a particular time frame. Alliance argues that cable operators will need at least 120 days before they can implement the Commission's final rule but that the Commission should clarify that, during the interim period, the provisions of section 10 are to be stayed. MPAA states that an acceptable time frame for implementation would be 120-180 days from the date the final rules become effective.

**Discussion**

69. We are aware that implementation of the new blocking requirements may be difficult for some cable systems that are not as technologically advanced as addressable systems and that the new requirement may require considerable adjustments by some cable systems in terms of rearranging existing services to accommodate a single leased access channel of indecent programming. In addition, the new regulations will require cable operators to establish and administer new procedures for subscriber notification of the availability of this new channel and for the processing of requests of leased access users and of subscriber requests for this channel, etc. We are also aware of the efforts that may be involved for those systems that require trapping devices to circumscribe access to these services.

70. In view of the foregoing considerations, we will require that cable operators have in place blocking implementation mechanisms and procedures within 120 days of the date of publication of the new regulations in the Federal Register so that thereafter they will not carry programming identified as indecent on non-blocked channels and will be able to accommodate any request for carriage of indecent programming on a blocked leased access channel within 0 days after its receipt. The 120 day period should provide cable operators sufficient time within which to make technical arrangements, inform subscribers of the new leased access blocking requirement and afford subscribers adequate time to notify the cable

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[46] We have already addressed in paras. 12-17, *supra*, the mandatory "blocking" approach versus section 624's voluntary "lockbox" approach. Nevertheless, we think it would be permissible to place all indecent leased access programming on a single channel and use lockboxes as a blocking mechanism, so long as the blocking is accomplished in a non-voluntary manner such that access to the channel is precluded unless and until subscribers request access in writing. We believe this approach would satisfy the plain language of the statute (requiring subscribers to gain access by making requests in writing) and the statute's clear intent that cable operators, not subscribers, be responsible for initial blocking.

[47] As discussed below, however, operators must have the capability to block such a channel within the implementation time frame specified in our rules.

[48] As suggested by one commenter, the "blocked" channel shall be counted as part of the cable operator's obligation to provide leased access capacity under section 612, as amended by the new Cable Act.

[49] However, as previously indicated, *supra* note 39, we believe that cable oprators with written and published policies issued pursuant to section 10(a) have authority under that section to block indecent programming and to schedule it as they please on blocked channels.

[50] We decline to address at this time whether operators that do not have a written and published policy under section 10(a) might be required to provide an additional blocked channel in the event a single channel is filled. If and when that circumstance arises, we can examine that question in a concrete factual setting.

operator in writing if they wish to receive any programming on the channel when, and if, it becomes available on the system.[51]

71. This, or similar measures taken during the transition period,[52] should also enable cable operators to approximate the number of subscribers initially interested in receiving the channel, which should assist in technical implementation of the blocked channel. At the expiration of the 120 day period, cable operators subject to section 10(b) will be required to place indecent programming on a blocked channel. This means that, no later than 30 days prior to the expiration of the 120 day period, programmers must identify any programming that is indecent and which is intended to be carried on the 121st day of the time period.

72. We believe that these time frames are reasonable and are generally consonant with the time frame requested by most of the parties in their comments. We note that cable operators have been on notice of the statute's requirement since the date of enactment of the new Cable Act, October 5, 1992. We further note that many cable systems have existing technology in place in various degrees for use in providing other services that can be adapted toward fulfilling these requirements. Thus, even though the implementation period may not be as long as many cable operators would prefer, we believe it is sufficient.

### VI. Resolution of Disputes under Sections 10(b)

73. There was a broad range of comment over the forum and the manner in which disputes relating to indecent programming on leased access channels should be handled. Some comments specifically addressed procedures for the leased access channels while other comments, particularly from access groups, were directed solely at the public, educational, and leased access channels on cable systems.[53] Time suggested that such disputes should be resolved locally, preferably in court, while others, such as Cox Cable, contend that the Commission is the proper forum for resolution of disputes. NCTA and others suggest that the Commission should adopt expedited resolution procedures consonant with the new provision in amended section 612 (c)(4)(iii) that requires establishment of "procedures for the expedited resolution of disputes concerning rates or carriage under this section." Intermedia argues that the Commission should exercise exclusive jurisdiction, particularly over prior restraint issues and disputes.

74. Denver Access maintains that disputes should be appealable to the Commission or another neutral adjudicator. NATOA maintains that disputes should be resolved by the courts because, ultimately, they must decide the constitutional issues. Alliance maintains that without procedural safeguards applicable to prior restraints on speech, the statute and implementing regulations cannot withstand constitutional scrutiny.

#### Discussion

75. We do not envision disputes arising from the content of programs on the leased access channel except where a program, not identified by a program provider as indecent, is carried on a non-blocked leased channel, and is alleged to be indecent. In view of the fact that Congress explicitly required us to adopt regulations implementing section 10(b), we believe that, in such instances, we are obligated to specify procedures for resolution of disputes relating to section 10(b)'s implementation. Therefore, where such disputes arise (e.g., there is an allegation that a program provider failed to comply with the new program identification rules), we will entertain special relief petitions under section 76.7 of our rules, 47 C.F.R. §76.7, from cable operators in accordance with the existing procedures we have established.[54] Similarly, we will entertain complaints from subscribers in accordance with our existing complaint procedures. If the petition or complaint is meritorious, we will then take appropriate action, based upon the circumstances, e.g., issue a warning or a notice of apparent liability for violation of the statute and/or Commission rules, or denial of leased access to a program provider in the future.[55]

### VII. Final Regulatory Analysis Statement

76. *The Need and Purpose of this Action.* The regulations in this *First Report and Order* are intended to implement that part of Section 10 of the Cable Consumer Protection and Competition Act of 1992 that directs the Commission to adopt regulations designed to limit children's access to indecent programming on commercial leased access channels. The regulations accomplish this by requiring cable operators (which do not voluntarily prohibit indecent

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[51] As we noted earlier, subscribers should notify the cable operator in writing at least 30 days prior to the date they wish to receive the service and the notification should include a statement that the subscriber is at least eighteen years of age.

[52] Unless cable operators have a written and established policy of prohibiting indecent leased access programs adopted under section 10(a) of the new Cable Act, they will not be permitted to prohibit indecent programming on the leased access channels during the transition period to the blocking approach. We decline to stay the provisions of section 10(a), as requested by Alliance, because we are not empowered to stay statutory provisions and, moreover, both section 10(a) and section 10(d) are self-executing provisions that became effective 60 days after enactment of the new Cable Act on October 5, 1992. We also shall not stay the effectiveness of the new rules adopted under section 10(b) pending court review, as requested by Alliance.

[53] As noted previously, that part of this rule making addressing restrictions on the public, educational, and leased access channel will be addressed at a later date in a separate *Report and Order*. Accordingly, those comments will be considered therein.

[54] Congress, in section 9 of the new Cable Act, requires us to "establish procedures for the expedited resolution of disputes concerning rates or carriage under this section." We believe that Congress intended by this provision to ensure that the rights of leased access users to carriage or reasonable rates under section 612 of the Communications Act would not be unduly prejudiced pending resolution of such disputes. To the extent that the existing carriage rights of access users may be affected in the interim pending resolution of a dispute under section 10(b) of the new Cable Act, we will apply these expedited procedures.

[55] To the extent other disputes arise between the cable operator and program provider, they can also be handled, as appropriate, under the special relief provisions of section 76.7 of our rules, 47 C.F.R. §76.7, particularly where they involve other provisions of amended section 612 of the Act relating to rates, terms, and conditions of leased access use.

programming) to place indecent programming, as identified by program providers, on a "blocked" leased access channel and restricting subscriber access to this channel unless specifically requested in writing by a subscriber.

77. *Summary of Issues Raised By the Public Comments in Response to the Initial Regulatory Flexibility Analysis.* Boston Community Access commented on the failure of the initial analysis to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers, not merely the new burdens that would be placed on cable operators. Although others pointed out the burdens that would be imposed on access administrators, access users, and others, their comments were not specifically directed to the Initial Regulatory Flexibility Analysis.

78. *Significant Alternatives Considered and Rejected.* In this *First Report and Order,* we have considered the most efficacious manner to implement the section 10's provisions relating to indecent programming on leased access channels and in the least burdensome manner that is consistent with the statute's aims. To the extent that Boston Community Access' comments, noted above, are directed to adoption of restrictions relating to the public, educational, and governmental access channels, they will be addressed in a subsequent *Report and Order.* To the extent they are intended to address leased access channel restrictions, we have attempted to minimize the burdens on leased access program providers by not requiring notification as to each individual program provided by them and by requring such notifications only by those responsible for the content of the programming. No other significant alternatives consistent with the aims of the statute were presented.

**VIII. Conclusion**

79. Our purpose has been to implement the provisions of section 10(b) which, in accordance with the will of Congress, are intended to safeguard the well-being of children in our society, a compelling governmental interest, by reducing their exposure to indecent programming on commercial leased access channels. By the same token, we have sought to protect the constitutionally protected rights of others to distribute, and receive access to, such programming on cable television. We believe that the regulations we have adopted strike an appropriate balance between these aims.

**IX. Ordering Clauses**

80. Accordingly, pursuant to section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385, and sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules IS AMENDED, as set forth in Appendix A below, effective 120 days from the date of publication in the *Federal Register.*

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**APPENDIX A**

**AMENDATORY TEXT**

**PART 76 -- CABLE TELEVISION SERVICE [AMENDED]**

1. The authority citation of Part 76 is amended to read as follows:

**Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Sec. 612, as amended, 106Stat. §1460, 47 U.S.C. §532**

2. Part 76 is amended by adding the following subpart:

Subpart L -- Cable Television Access

**§76.701 Leased Access Channels**

(a) Notwithstanding 47 U.S.C. §532(b)(2) (Communications Act of 1934, as amended, Section 612), a cable operator, in accordance with 47 U.S.C. § 532(h) (Cable Consumer Protection and Competition Act of 1992, §10(a)), may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

(b) A cable operator that does not prohibit the distribution of programming in accordance with paragraph (a) shall place any leased access programming identified by program providers as indecent on one or more channels that are available to subscribers only with their prior written consent as provided in paragraph (c).

(c) A cable operator shall make such programming available to a subscriber within 30 days of receipt of a written request for access to the programming that includes a statement that the requesting subscriber is at least eighteen years old; a cable operator shall terminate a subscriber's access to such programming within 30 days from receipt of a subscriber's request.

(d) A program provider requesting access on a leased access channel shall identify for a cable operator any programming that is indecent as defined in paragraph (g). Such identification shall be in writing and include the full name, address, and telephone number of the program provider and a statement that the program provider is responsible for the content of the programming. A cable operator may require that such identification be provided up to 30 days prior to the requested date for carriage. A program provider requesting carriage of "live programming" on a leased access channel that is not identified as indecent must exercise reasonable efforts to insure that indecent programming will not be presented. A cable operator will not be in violation of paragraph (b) if it fails to block indecent programming that is not identified by a program provider as required in paragraph (d).

(e) A cable operator may request a program provider to certify that the programming intended for leased access is not obscene programming or indecent programming subject to the requirement of paragraph (b). A cable operator may request a program provider of "live programming" to certify that reasonable efforts will be

made to ensure that such programming is not obscene programming or indecent programming subject to the requirement of paragraph (b).

(f) A cable operator shall not be required to provide leased access to a program provider if –

(1) the program provider refuses to identify whether programming is indecent as required under paragraph (d); or

(2) the program provider refuses or fails to certify, if requested by the cable operator under paragragh (e), that the programming is not obscene programming or indecent programming subject to the requirement of paragraph (b); or

(3) the program provider refuses or fails to certify, if requested by the cable operator under paragraph (e), that reasonable efforts will be made to ensure that any "live programming" is not obscene programming or indecent programming subject to the requirement of paragraph (b); or

(4) the program provider has failed to provide up to thirty days prior notice, if requested by the cable operator, that the programming is indecent.

(g) For purposes of paragraphs (b)-(f), "indecent programming" is any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.

(h) Cable operators shall retain records sufficient to verify their compliance with paragraph (b) of this section and make such records available to the public. Such records must be retained for a period sufficient to cover the limitations period specified in 47 U.S.C.§503(b)(6)(B).

3. Section 76.305(a) is amended by deleting the word "and" before "§76.225(c)" and deleting the period at the end of that paragraph and inserting "and §76.701(h) (records for leased access)."

## APPENDIX B

### COMMENTS

Acton Corp., Allen's Television Cable Service, Inc., Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM, Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association ("Acton")

Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way (jointly) ("Alliance")

Ann Arbor Community Access Television

Arizona Cable Television Association*

Baratta, Mark Conrad*

Biddeford Public Access Corp.*

Blade Communications, Inc.; Multivision Cable TV Corp.; Parcable, Inc.; Providence Journal Company; and Sammons Communications, Inc. (jointly) ("Blade Communications')

Bogue, Virginia B. and Amy Lorum* Boston Community Access and Programming Foundation ("Boston Community Access")

Capital Community Television, Salem, Oregon

City of Austin, Texas*

City of Cleveland Heights*

City of San Antonio, Texas

City of Santa Barbara*

City of Tampa, Florida

Cole, Roxie, Lee

Columbus Community Cable Access, Inc.

Community Access Network, Incorporated

Community Antenna Television Association, Inc. ("CATA")

Continental Cablevision, Inc. ("Continental Cablevision")

Cox Cable Communications ("Cox Cable")

Crandall, Judy

Defiance Community Television

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Dreety, David B.

Fortriede, Steven C., Associate Director, Allen County Public Library, Fort Wayne, Indiana

Hillsborough County Board of County Commissioners

Hudson Community Access Television*

Inter-Comm Network

Intermedia Partners ("Intermedia")

Manhattan Neighborhood Network

Metropolitan Area Communications Commission*

Multnomah Community Television National Association of Telecommunications Officers and Advisors, Nationai League of Cities, United States Conference of Mayors and the National Association of Counties ("NATOA")

National Cable Television Association, Inc. ("NCTA")

Nationwide Communications Inc. ("Nationwide Communications")

Neuman-Scott, Mark*

Nutmeg Public Access Television, Inc.

Rhoda, Carolyn*

Seffren, David A.*

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Visser, Randy, Director SPTV

Waycross Community Television

**REPLY COMMENTS**

Acton Corp., Allen's Television Cable Service, Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Greater Media, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association, Western Communications, Inc. ("Acton")

Alliance for Community Media, The Alliance for Communications Democracy, The American Civil Liberties Union and People for the American Way ("Alliance")

Austin Community Television, Inc.

Baus, Janet

Cambridge Community Television

Channon, David

Cincinnati Community Video, Inc.

City of Austin, Texas

City of St. Paul

Columbus Community Cable Access, Inc.

Community Antenna Television Association, Inc.

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Friendly, Joe

Malden Access Television*

Mollberg, Erik S.

Motion Picture Association of America, Inc. ("MPAA")

Multnomah Community Television

National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conferene of Mayors, and the National Association of Counties ("NATOA")

National Cable Television Association ("NCTA")

New York Citizens Committee For Responsible Media*

Northrup, Dan

Nunez, Fred

Olelo: The Corporation'&70* ( (Staten Island Community

Television

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Tucson Community Cable Corporation

Tsuno, Keiko

Viacom International Inc. ("Viacom")

Vitiello, Marisa

Waycross Community Television

Wyrod, Robert

* Informal comment or informal reply comment

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T Communications,
Complainant,

v.

Northwestern Bell Telephone Company,
Defendant.

File No. E-88-21S

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 29, 1993; Released: February 8, 1993**

By the Commission:

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## I. INTRODUCTION

1. In this Memorandum Opinion and Order, we award damages to complainant, AT&T Communications (AT&T), for defendant's, Northwestern Bell Telephone Company (NWB), violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986 for the reasons and to the extent indicated below. As also discussed below, we grant AT&T's request for interest on the damages awarded herein.

## II. BACKGROUND

2. On January 9, 1990, the Commission issued a Memorandum Opinion and Order in the above-captioned proceeding finding that AT&T had met its burden of establishing that the defendant local exchange carrier (LEC) had violated Section 201(b) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 201(b), by earning in excess of the rate of return prescribed by the Commission for the period October 1, 1985 through December 31, 1986.[1] In so ruling, the Commission rejected various arguments raised by the defendant to support its claims that allegations of earnings in excess of a prescribed rate of return fail to state a cause of action for damages under the Act. The Commission also concluded that the decision of the U.S. Court of Appeals in *American Telephone and Telegraph Company v. FCC*[2] does not preclude an award of damages based on " earnings in excess of a prescribed rate of return.[3] The Commission also rejected: (a) claims by NWB that Section 415 of the Act barred all or portions of AT&T's complaint;[4] and (b) NWB's assertions of procedural irregularities in the Bureau's and Commission's handling of the complaints.[5]

3. In finding that NWB had violated the Act by earning in excess of the prescribed rate of return, the Commission further held that the defendant is liable for damages to the extent that the complainant can establish that it was damaged as a result of the violations.[6] The Commission directed AT&T to file a supplemental complaint for damages pursuant to Section 1.722 of the Commission's rules[7] within sixty days from release of the liability order if it wished to pursue its damages claims.[8] On March 12, 1990, AT&T filed a supplemental complaint for damages. NWB has filed an answer, motions to dismiss, and related pleadings in which it disputes the complainant's damages claims.[9]

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[1] American Telephone and Telegraph Company v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[2] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*).

[3] *See AT&T Liability Order*, 5 FCC Rcd at 146-148, paras. 45-60.

[4] *See* 47 U.S.C. § 415. Subsection 415 (b) provides in pertinent part that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after ...." The term "overcharges" is defined in subsection 415 (g) to mean "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission."

[5] *AT&T Liability Order*, 5 FCC Rcd at 148-149, para. 50.

[6] *Id.* at 143, paras. 2, 60.

[7] 47 C.F.R. § 1.722.

[8] *AT&T Liability Order*, 5 FCC Rcd at 149, para. 60.

[9] NWB filed a Supplemental Motion to Dismiss Complaint for Damages on April 11, 1990, and a Supplement to Motion to Dismiss on February 14, 1992. AT&T opposed each of these pleadings and NWB replied. The motion to dismiss is dismissed consistent with our rulings herein.

4. On May 11, 1992, the Common Carrier Bureau (Bureau) released an order resolving the then outstanding discovery disputes and establishing further discovery and briefing schedules.[10] Pursuant to the *Discovery Order*, the parties submitted their initial briefs and reply briefs setting forth their respective claims and arguments.[11]

## III. THE COMPLAINTS FOR DAMAGES

5. AT&T's damages claim rests primarily on the contention that the proper measure of damages it incurred as a result of NWB's rate of return prescription violations is the difference between the amounts it actually paid NWB for overall interstate access services during the October 1, 1985 through December 31, 1986 monitoring period and the amount it would have paid if NWB's rates produced earnings that did not exceed the Commission's prescription. NWB, however, has raised a number of challenges to AT&T's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *AT&T Liability Order*. We address the parties' pertinent contentions below.

### A. Liability For Damages

#### 1. Contentions of the Parties

6. NWB raises a number of arguments to support its claims that it cannot be held liable for damages based solely on the fact that its rates produced earnings in excess of the Commission's prescribed rate of return. For the most part, these arguments were considered at length and rejected in the *AT&T Liability Order* and require no further discussion here.[12] NWB makes the additional argument that the court's decision in *Ohio Bell Telephone Company v. FCC*,[13] issued after the release of the *AT&T Liability Order*, requires dismissal of AT&T's complaint.[14] According to NWB, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot order refunds for carrier overearnings on an individual operating company basis without taking into account total company earnings.[15] According to NWB, since NWB, Pacific Northwest Bell Telephone Company, and Mountain States Telegraph and Telephone Company, as a whole, earned less than the prescribed minimum return (12.75%) during the 1985-1985 period, no overearnings can be found.[16]

7. AT&T counters that *Ohio Bell* simply followed *AT&T v. FCC* and vacated a Commission order requiring automatic refunds of overearnings at the special access *category* level.[17] AT&T argues that unlike the refund in *Ohio Bell*, it is seeking to recover damages pursuant to the private complaint remedy of the Act for NWB's violation of the Commission's rate-of-return prescription for overall interstate access services.[18] AT&T contends that, like *AT&T v. FCC, Ohio Bell* simply involved another Commission public enforcement proceeding, and the Court's reasoning is inapplicable to individual complaints for damages under Section 208.[19] AT&T further contends that, since its complaint is based on overall interstate access overearnings, overearnings in one access service category can be "netted out" against the underearnings in another access service category to achieve the overall rate of return thereby remedying that aspect of the automatic refund mechanism criticized by the court in *AT&T v. FCC*.[20]

8. In addition, AT&T attempts to refute NWB's arguments that NWB's overearnings can be offset by an affiliate carriers's underearnings by arguing that during the 1985-1986 monitoring period, NWB "was a separate and distinct local exchange carrier that was independently subject to the Commission's regulatory authority."[21] AT&T states that US West, on the other hand, is a holding company, not a carrier subject to the Commission's regulatory jurisdiction, and offered no tariffed communication service.[22]

#### 2. Discussion

9. Contrary to NWB's contentions, *Ohio Bell* does not undermine our decision in the *AT&T Liability Order* that a complainant/customer may recover damages if it can establish that a carrier from whom it purchased service has violated a valid rate of return prescription and that the complainant/customer suffered damages as a result of the violation. In *Ohio Bell* the court found, as in *AT&T v. FCC*, that any requirement that carriers refund earnings in excess of a prescribed rate of return that failed to take into account a carrier's underearnings, appeared to be

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[10] AT&T Communications v. Northwestern Bell Telephone Company, 7 FCC Rcd 2982 (Com.Car.Bur. 1992) (*Discovery Order*). NWB served interrogatories on AT&T to which AT&T responded in part and objected to in part on June 5, 1992. NWB filed a motion to compel responses to certain interrogatories on June 10, 1992, which motion was opposed by AT&T. NWB replied. The Common Carrier Bureau (Bureau) subsequently denied the motion to compel. *See* AT&T Communications v. Northwestern Bell Telephone Company, 7 FCC Rcd 4097 (Com.Car.Bur. 1992). AT&T filed its brief on July 2, 1992 (AT&T Br.) and NWB also filed its brief on July 2, 1992 (NWB Br.). AT&T filed its reply brief on July 13, 1992 (AT&T RBr.) as did NWB (NWB RBr.).

[11] As a preliminary matter, we note that NWB has stated that it filed its brief directly with the Commission because it could find no order delegating damages authority to the Bureau. In addition, NWB formally objects if the Bureau is deciding these cases under delegated authority because it contends that the Bureau has been performing investigative and prosecutorial functions in these proceedings and cannot, under Section 554(d) of the Administrative Procedure Act (5 U.S.C. § 554(d)), act as decision maker herein. NWB Br. at 2, n.5. While we agree with NWB that the damages issue must be decided by the Commission, 47 U.S.C. § 155(c)(1), the Bureau may deal with interlocutory matters such as discovery issues. We also disagree with NWB's characterization of the Bureau's activities regarding these complaint proceedings. The Bureau has at all times been acting as the "decision maker" and not as an "investigator" or "prosecutor."

[12] *AT&T Liability Order*, 5 FCC Rcd at 146-148.

[13] 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*).

[14] NWB Supplement to Motion to Dismiss at 3, 5.

[15] *Id.* at 2-3.

[16] *Id.* at 2.

[17] AT&T Opposition to Supplement to Motion to Dismiss at 2.

[18] *Id.*

[19] *Id.* at 4-5.

[20] *Id.* at 6.

[21] *Id.* at 8.

[22] *Id.* AT&T also argues that this situation has not changed because US West has created another holding company, US West Communications, Inc., to own the stock of its three local exchange carrier subsidiaries. AT&T states that the new holding company did not file any of the rates or tariffs at issue in this proceeding, and, in fact, did not even exist during the 1985-1986 monitoring period. *Id.* at 9, n. **

inconsistent with the Commission's own understanding of its rate of return prescription.[23] The court's reasoning was apparently based on its belief that the Commission considered a rate of return prescription to establish both minimum and maximum limits on the earnings levels of the affected carriers.[24] The Commission, however, recently clarified its position that a rate of return prescription is not a minimum, but rather a point within a broad zone of reasonableness:

> We acknowledge that the Commission may not have made its understanding of the rate of return it prescribes sufficiently clear in prior orders. However, subsequent to the [decision in *AT&T v. FCC*], we emphatically explained our position:
>
> > 'In light of the ruling in [*AT&T v. FCC*], in which the Court of Appeals determined that our automatic refund provision was at odds with our own understanding of our rate of return prescription, we wish to clarify that we do not view this prescription as both a maximum and a minimum.' That is, it does not represent a unique balance point such that '[i]f the rate were higher, the balance would tip in favor of the investor; if lower, it would tip in favor of the consumer.' Our accumulated experience with rate of return prescriptions...convince us that there is no such point. Indeed, even the lower boundary of our range of cost of capital estimates does not represent a bright line such that a company earning just below that level would be forced out of business. We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.'[25]

The Commission went on to emphasize that this point is "neither the maximum nor minimum necessary to meet constitutional standards."[26] Rather, the Commission stated, it is a point selected based on consideration of all relevant factors, within a zone that is narrower than the zone bounded on the lower end by the constitutional minimum.[27] Therefore, the concern raised by the court in *AT&T v. FCC*, and echoed in *Ohio Bell*, about inconsistencies in the Commission's rate of return theory have been satisfied in the Commission's subsequent rate of return proceedings.

10. In any event, we disagree with NWB's claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss AT&T's complaint. As we emphasized in the *AT&T Liability Order*, automatic refunds and refunds ordered under Section 204 of the Act are distinctly different from individual actions for damages. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission discretion, individual actions for damages under Section 208 must be initiated by a private party seeking damages in an injury to itself; that private party has the burden of establishing both a violation of the Act and actual injury.[28] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; nor did they invalidate private actions for damages; and their analysis is not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *AT&T Liability Order* that NWB has violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making its rates unjust and unreasonable under Section 201 of the Communications Act and itself liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[29]

### B. Damages and Interest Claims

#### 1. Damages

##### a. Contentions of the Parties

11. As referenced above, AT&T's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of NWB's violations is the

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[23] *Ohio Bell*, 949 F.2d at 874.

[24] 949 F.2d at 872-873. In *AT&T v. FCC*, the court stated that

> ...the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription. That authority must, however, be exercised in a way that does not contradict the Commission's own theory of rate of return regulation.

*AT&T v. FCC*, 836 F.2d at 1392. The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390.

[25] Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, CC Docket No. 92-133, Notice of Proposed Rulemaking and Order, 7 FCC Rcd 4688 (1992) (*NPRM & Order*) at 4701, para. 96 (footnotes omitted) citing to Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, Order, 5 FCC Rcd 7507 (1990) at 7532, para. 217, *recon. denied*, 6 FCC Rcd 7195 (1991) *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 91-1020 (D.C. Cir. Jan.11, 1991).

[26] *NPRM & Order*, 7 FCC Rcd at 4710, para. 97.

[27] *Id.*

[28] *See AT&T Liability Order*, 5 FCC Rcd at 147, para. 43. b

[29] *Id.* at 149, para. 60.

difference between the amount it actually paid NWB for interstate access services during the October 1, 1985 through December 31, 1986 period and the amount it would have paid if NWB's rates had produced earnings that did not exceed the Commission's prescribed maximum rate of return.[30] In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from NWB's rate of return violations could be that difference.[31] The Bureau was not persuaded on the record before it, however, that a damages determination based on such a measure reflected actual damages incurred by AT&T.[32] NWB was invited to submit evidence that could serve to mitigate or otherwise reduce AT&T's damages claims. Specifically, the Bureau stated that evidence that would show that AT&T's share of excessive earnings realized by NWB could be offset or otherwise reduced due to facts and circumstances surrounding AT&T's purchase of NWB's interstate access services offerings for the 1985-1986 monitoring period might be relevant.[33]

12. Under its damages approach, AT&T states that it should be awarded damages of $8.727 million, exclusive of interest, which it claims represent AT&T's contribution to NWB's earnings above the maximum 13.10 percent rate of return prescribed by the Commission for overall interstate access service.[34] AT&T states that this amount is set forth in a letter dated February 23, 1990, from Glenn Brown, Executive Director-Regulatory Operations, US WEST Communications to Barry Zahn, Assistant Vice President, AT&T.[35] In addition, AT&T contends that it is entitled to interest through June 30, 1992 of $5.749 million computed at the maximum allowable rates of return for NWB plus interest of almost $82,000 monthly through the date it filed its final brief in this proceeding.[36]

13. NWB challenges AT&T's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *AT&T Liability Order*. NWB contends that by simply basing its damages claims on a calculation of AT&T's prorated share of its total interstate access overearnings, AT&T asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[37] NWB maintains that such a result is expressly precluded by *AT&T v. FCC*. NWB next argues that AT&T is seeking a retroactive adjustment to NWB's rates for 1985-86 and any refund/damages awarded to AT&T would violate the rule against retroactive ratemaking.[38] In addition, NWB contends that a damages award to AT&T would drive the US West companies' overall company-wide rate of return further below the minimum necessary to raise capital and would constitute&confiscatory ratemaking, and, accordingly, is expressly precluded by the courts' decisions in *AT&T v. FCC* and *Ohio Bell*.[39] Additionally, NWB argues that the Bureau committed reversible error when it denied NWB's request for information regarding whether AT&T has passed any undisclosed settlements stemming from disputed interstate access charges on to its customers and whether AT&T intends to pass to its customer any damages awarded for interstate access overearnings.[40] NWB argues that the Bureau has improperly denied it access to clearly relevant information.[41] NWB asserts that the Commission has previously required AT&T to flow refunds through to its customers in a situation where AT&T had received overearnings refunds.[42] Consistent with the Commission's decision in the *Comsat Order*, NWB argues that AT&T should be compelled to make a showing regarding how it plans to flow through any refunds/damages, if any, to its customers.[43]

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[30] In support of its approach to damages, AT&T cites to a number of cases including *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968), an antitrust action:

> We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows that amount of the overcharge, he has made out a prima facie case of injury and damage [in the full amount of the overcharge].

*Accord Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531, 533-35 (1918) (*Darnell-Taenzer)* (carrier required to pay reparations to shipper in the amount the rate charged by the shipper exceeded the rate found reasonable by the Interstate Commerce Commission (ICC)); *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 234-38 (1925) (*Sloss-Sheffield)* (The Court upheld the ICC and the District Court determination that the shipper was damaged to the extent of the difference between the charges paid and those that would have been paid at the rates found reasonable.); *Adams v. Mills*, 286 U.S. 397, 406-08 (1932) (*Adams)* (Plaintiffs, agents for shippers, suffered injury under § 8 of the Interstate Commerce Act (ICA) and purpose of that section would be defeated if "tortfeasors were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge.") According to AT&T, *Darnell-Taenzer*, *Sloss-Sheffield*, and *Adams* construe the provisions of the ICA that are the "source and direct counterpart of the complaint and damages provisions in Sections 206-209" of the Act. AT&T Br. 4.

[31] *Discovery Order*, 7 FCC Rcd at 2983, para. 9.

[32] *Id.*

[33] *Id.*

[34] AT&T Br. at 3.

[35] *Id.* A copy of the letter is attached as Exhibit A to AT&T's brief. AT&T also states that NWB "has now conceded that the amount specified in the [February 23, 1990] letter relates to the same interstate access services and rate of return monitoring period at issue in this proceedings." AT&T Br. at 3, n.** citing to a letter dated June 8, 1992 from Lawrence E. Sarjeant, Chief Counsel-Federal Regulatory, US West, Inc. to David Condit, General Attorney, AT&T. A copy of this letter is attached as Exhibit B to AT&T's brief.

[36] AT&T Br. at 8-9 and 9, n.**. According to AT&T, these rates ranged from 11.25% to 12.25%.

[37] NWB Br. at 4-6.

[38] *Id.* at 6-7 citing to *Southern Union Gas Co. v. F.E.R.C.*, 725 F.2d 99, 102 (10th Cir. 1984); *Nader v. FCC*, 520 F.2d 182, 198-99 (D.C.Cir. 1975); *Electrical Dist. No. 1 v. F.E.R.C.*, 774 F.2d 490, 492 (D.C. Cir. 1985); and *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

[39] NWB Br. at 7-8 and 11-12.

[40] *Id.* at 16-17.

[41] *Id.* at 17.

[42] *Id.* at 16 citing to Communications Satellite Corporation, 4 FCC Rcd 8514 (1989) (*Comsat Order).*

[43] NWB Br. at 16, n.44.

14. NWB next contends that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude AT&T's damages claims, the claims still fail because AT&T's complaint does not establish a valid cause of action. According to NWB, to pursue a damages claim, AT&T must first show that NWB charged unjust and unreasonable rates for interstate access services during the period in question, not that NWB's rates produced an excessive return for overall interstate access.[44] Moreover, NWB argues, Section 206 of the Act[45] requires AT&T to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[46] NWB maintains that AT&T "concedes that it does not have a clue as to whether it was damaged or not"[47] and does not intend to prove damages.[48]

15. NWB vigorously argues that regardless of how AT&T characterizes the relief it seeks, AT&T is seeking restitution or a refund of tariffed charges, not damages. NWB contends that any form of refund or restitution to AT&T would be contrary to the public interest.[49] NWB further contends that an award of damages would be inequitable because (i) the U S West companies' total corporate rate of return would be driven below the confiscatory level; (ii) there was uncertainty surrounding the tariff filings during the relevant period; and (iii) AT&T would receive a windfall that would be inconsistent with sound equitable principles.[50] This is so, NWB contends, because, among other things, AT&T's rate would have been lower had NWB's rates paid by AT&T been lower thereby preventing any damage to AT&T.[51] Moreover, NWB argues, the Commission has previously required AT&T to pass through other overearnings refund/damages to its customers.

16. AT&T counters that NWB's threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *AT&T Liability Order* and are an impermissible collateral attack on that order. AT&T argues that the *AT&T Liability Order* disposed of NWB's claims that a damages award here would constitute unlawful retroactive ratemaking,[52] finding the rule inapplicable to a claim for damages. AT&T states that the Commission specifically held that a claim for damages under Sections 206-209 of the Act involves no exercise of the Commission's ratemaking powers under Sections 204-205 of the Act.[53] AT&T adds that NWB's arguments that it has failed to allege and prove violations of the Act and actual damage are unfounded because it has made a sufficient showing of each under traditional principles governing its right to such relief. According to AT&T, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for the services it purchased from NWB during the relevant period. AT&T argues that NWB has conceded that the amount of damages based on the difference between the amounts AT&T actually paid and the amount it would have paid if NWB's rates had earned at the prescribed levels is $8.727 million.[54] AT&T attempts to refute NWB's argument that an award of damages would result in a windfall to AT&T by asserting that the claim is based on an erroneous assumption that AT&T's rates would have been lower had NWB's rates been lower.[55] AT&T points out that its 1985-86 interstate earnings were below AT&T's maximum allowed rate of return, therefore, AT&T would not have been required to lower its rates in response to lower NWB access charges.[56] AT&T further contends that NWB's claim that the Commission's decision in the *Comsat Order* precludes an award of damages is baseless. AT&T argues that the *Comsat Order* dealt with the issue of whether a refund ordered by the Commission under Section 204 should be reflected in an adjustment to AT&T's price cap indices, not a damages award under

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[44] NWB argues that AT&T must specify an identifiable rate that AT&T paid that was too high or too low. NWB Br. at 14. In addition, NWB cites to a 1970 circuit court decision to support its claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). USWC's reliance on *Middlewest* is misplaced. *Middlewest* dealt with the question of restitution (not damages) to shippers for charges collected by carriers during the pendency of an injunction improperly issued by a district court against an ICC order, which had found the carriers' rates to be unlawful. The circuit court found the injunction to be improperly issued and ordered restitution by the carriers for higher charges collected while the injunction remained in effect. In discussing the difference between overcharges, reparations, and restitution the court pointed out that, in the context of reparations, the agency and not the court must determine the just and reasonable rate when filed rates are found to be unjust and unreasonable. The *Middlewest* decision thus focused on restitution under very narrow circumstances -- restitution for higher charges collected by carriers despite a determination by the expert agency charged with regulating the rates that the rates were unlawful.

[45] *See* 47 U.S.C. § 206.

[46] NWB Br. at 15.

[47] *Id.* at 14.

[48] *Id.* at 16.

[49] *Id.* at 18-26. NWB argues that AT&T must plead its case in equity and the Commission may only award a refund/damages if we find that the public interest will be served by a refund/damages award to AT&T. NWB contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). NWB states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 14, citing to *Moss*, 521 F.2d at 304. Once again NWB's reliance on a court ruling is misplaced. *Moss* dealt with a claim for restitution by airlines passengers for fares paid pursuant to an order of the Civil Aeronautics Board (CAB) later found procedurally infirm by the court. The court had previously held that fares charged by the airlines pursuant to the CAB order were unlawful because the CAB had not complied with the requirements of the Federal Aviation Act in determining such rates. *See Moss v. CAB*, 430 F.2d 891 (D.C.Cir 1970). The CAB, at the time of *Moss*, lacked any express reparations (damages) or refund power. The court noted that "...recovery can only be had in terms of restitution grounded in equitable considerations." 521 F.2d at 314. We are not limited herein to restitution because the Commission has express statutory reparations authority, which is embodied in Sections 206-209 of the Act. The equity concerns discussed by the court in *Moss* are simply inapplicable to this individual damages complaint.

[50] NWB Br. at 22-25.

[51] *Id.* at 25.

[52] AT&T RBr. at 3.

[53] *Id.* at 4.

[54] AT&T notes that NWB apparently attempts to reduce this amount to $8.458 million in Exhibit C to NWB's brief. AT&T asks the Commission to reject NWB's effort to change the amount of overcharges to AT&T. *Id.* at 10, n.15.

[55] *Id.* at 11.

[56] *Id.* at 12.

Section 208 of the Act.[57] AT&T asserts that any price cap adjustment "does not in itself require *any* current rate reductions by AT&T to the extent that its actual price cap indices are already at or below the revised price cap levels."[58] AT&T also argues that the Supreme Court, in addressing analogous complaint provisions of the ICA, has rejected the "passing-on" argument.[59]

**b. Discussion**

17. *AT&T v. FCC and Ohio Bell:* NWB's claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to AT&T are without merit for the reasons stated in the *AT&T Liability Order*. We emphasized in that order that the court in *AT&T v. FCC* explicitly acknowledged this Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[60] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[61] We also emphasized that "the [*AT&T v. FCC* ] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[62] The *Ohio Bell* decision, which relied in part on the reasoning in *AT&T v. FCC*, similarly does not address this Commission's authority to award damages in private complaint actions under Section 208 of the Act. *Ohio Bell* follows *AT&T v. FCC;* it does not expand upon its holding. In *Ohio Bell*, the court held that a Commission refund order requiring carriers to refund overearnings in the special access category under strategic-pricing guidelines for the 1985-86 and 1987-88 monitoring periods was arbitrary and capricious because the order was inconsistent with the Commission policies establishing permissible rates of return.[63]

18. *Section 201(b) of the Act:* We turn now to NWB's contention that AT&T's damages claims must be dismissed because AT&T has failed to prove NWB's rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. These arguments were also previously raised by NWB in the liability phase of this proceeding. In the *AT&T Liability Order*, we specifically held that AT&T had met its burden of proof by establishing that NWB had violated our rate of return prescription "thereby violating the prescription orders and making its rates unjust and unreasonable under Section 201 of the Communications Act."[64] Accordingly, the question before us is not whether NWB's rates were unjust and unreasonable, but whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

19. NWB next claims that even if AT&T has sustained its burden and shown that NWB's rates were unjust and unreasonable, its damages claim must still fail because judicial precedent compels AT&T to establish what a just and reasonable rate would have been as a prerequisite to pursing a damages claim based on unreasonable rates.[65] These claims are not persuasive. We agree with the Bureau that a proper starting point for assessing damages based on violations of a rate of return prescription is to look at the difference between the amounts actually paid by AT&T for NWB's access services and the amounts AT&T would have paid if NWB had charged rates that had produced returns within the Commission's prescribed level.[66] The Bureau also rightfully found that there may circumstances surrounding or impacting AT&T's taking of NWB's access services to support NWB's claims that AT&T suffered no ascertainable damage that can be attributed to NWB's excessive earning levels.[67] The issue in these proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable. In emphasizing the Commission's authority under the Communications Act to prescribe and enforce carriers' rates of return,[68] we stated in the *AT&T Liability Order* that

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[57] *Id.* at 11, n.17.

[58] *Id.* [emphasis in the original].

[59] *Id.* at 12, citing to *Darnell-Taenzer*, 245 U.S. 531, 533-34 (1918); *Adams*, 286 U.S. 397, 406-408 (1932). In *Darnell-Taenzer*, the Court stated

> The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step.

245 U.S. at 533. Similarly in *Adams*, the Court found that the plaintiffs, commission merchants, suffered injury under the ICA and that the carriers could not escape reparations by arguing that the ultimate damage was not on the plaintiffs, "who were compelled in the first instance to pay the unlawful charge." 286 U.S. at 408.

[60] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[61] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[62] *AT&T Liability Order*, 5 FCC Rcd at 148, para. 49.

[63] *See Ohio Bell*, 949 F.2d at 873. The court pointed out that

> [p]etitioners rely primarily on *A.T.& T. v. F.C.C.* ... to argue that the Commission's order is arbitrary and capricious. *The case involved a refund order similar to the one in this case.*

949 F.2d at 872 (emphasis added).

[64] *AT&T Liability Order*, 5 FCC Rcd at 149, para. 60.

[65] NWB Br. at 14, citing *Middlewest*, 433 F.2d 212, 232.

[66] See *Discovery Order*, 7 FCC Rcd at 2983, para. 9.

[67]

> [I]t is conceivable that Northwestern Bell may be able to produce evidence or identify circumstances, including offsets if any, surrounding AT&T's taking of its access services offerings to establish or support its claims that complainant suffered no actual harm or incurred ascertainable damages that can be attributed to defendant's excessive earnings levels. Moreover, Northwestern Bell's factual showing could serve to mitigate or otherwise reduce AT&T's damage claims.

*Id.*

[68] *AT&T Liability Order*, 5 FCC Rcd at 147-148.

> [i]t does not disturb the balance of ratepayer and shareholder interests embodied in the Act to award damages to customers who demonstrate that they were injured by paying rates that resulted in a carrier earning in excess of its prescribed return. Under the Act, carriers have substantial flexibility in formulating rates.
>
> * * * * * * * * * * * *
>
> Furthermore, carriers are permitted to make mid-course corrections if their actual return deviates from the authorized return. If actual earnings are higher than the authorized return, a carrier can file reductions and thereby avoid the risk of being ordered to pay damages. If actual earnings are below the authorized return, a carrier can file rate increases. NWB had ample notice of our rules, which were developed in notice and comment Rule Making proceedings in which it participated, as well as the level of the prescription. As a general matter, it would be inequitable to permit NWB, who was in the best position to set its rates at lawful levels in the first place, and who later had opportunities to correct those rates, to avoid responsibility for those unlawful rates, at the expense of its customers.[69]

AT&T has shown that it purchased services from NWB at rates that produced earnings over and above the NWB's prescribed level. NWB, faced with the prospect of damages for violations of a binding rate of return prescription, cannot now so readily disavow the substantial flexibility afforded carriers to achieve their authorized rate of return. In effect, NWB would have us require AT&T to do what NWB was neither required nor apparently able to do, that is establish the precise rates required to bring its earnings within authorized levels for its interstate access service offerings. NWB asks too much. The Commission's rate of return prescription, although it afforded carriers considerable leeway in setting their rates, bound NWB to a maximum earnings limitation. We previously determined in the *AT&T Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie. It is appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels for purposes of assessing damages claims.

20. *Damages and Offsets:* NWB's arguments are devoted primarily to attempting to persuade the Commission that AT&T's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to NWB, militate against any award of damages to AT&T based on excessive earnings. NWB argues, in effect, that the damages AT&T seeks are equivalent to a refund that would have been required under the former refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to NWB's violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[70] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations. In addition, NWB's other equitable arguments regarding the uncertainty surrounding tariff filings during the 1985-86 period and an alleged windfall to AT&T should it receive restitution are equally unavailing. First, NWB had the opportunity to make corrections to its tariff in order to assure that its earnings would not exceed the prescribed rate of return. NWB was not forced by the Commission to overearn during the relevant monitoring period. Second, AT&T has shown that it paid unjust and unreasonable rates to the defendants, which entitles AT&T to an award of damages to the extent indicated here. The consideration of whether such an award would result in a windfall to AT&T simply has no place in the context of a Section 208 proceeding that, contrary to NWB's repeated assertions, is not governed by equitable principles. AT&T has been damaged by NWB's excessive earnings and, under legal principles, is entitled to award of damages.

21. We find NWB's arguments with respect to "passing-on" equally unavailing. AT&T has made a claim for specific damages, and NWB, in turn, may properly argue that it is entitled to certain offsets against those damages. NWB, however, cannot simply make damages "go away" by alleging that AT&T passed on NWB's charges that led to excessive earnings to AT&T's customers. Whether AT&T passed on the overcharges or absorbed them does not alter the fact that NWB overcharged AT&T in violation of a binding rate of return prescription and must answer for such violations. AT&T clearly has a claim for damages because it had to pay more for service than it would have if NWB's rates had produced earnings at or within the Commission's prescribed levels. If AT&T passed on the overcharges to consumers, it may have been harmed in its relationship with those consumers -- *e.g.*, lost customers, lost demand. The issue, however, is not what AT&T has done in response to paying excessive rates, but whether AT&T has been damaged as a result of these excessive rates. The Commission's decision in *Hughes Sport Network, Inc.*[71] along with the Supreme Court's decision in *Darnell-Taenzer* require that the "passing-on" defense be rejected. In *Hughes*, the Commission stated that

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[69] *Id.* at 148, paras. 47-48 [footnotes omitted].

[70] *See, e.g., Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), in which the Supreme Court construed relevant sections of the ICA:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

442 U.S. 444, 455, n.8.

[71] 34 FCC 2d 691 (*Hughes*) , *recon. denied*, 38 FCC 2d 1052 (1972).

> the imposition of a charge which is unlawful because it is unreasonably high entitles the customer to reparation of the excessive amount without regard to whether or not the damages were passed on to other parties.[72]

Similarly in *Darnell-Taenzer*, the Court stated

> The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step.[73]

22. Nor can we accept NWB's related contention that AT&T should be required to show how it plans to flow through any damages it may receive to its end user customers. NWB correctly points out that the Commission has previously required AT&T to flow through Commission-ordered refunds to its customers in ratemaking proceedings under Sections 204 and 205 of the Act.[74] In the absence of compelling circumstances, not present here, we do not believe flow-throughs would be appropriate in Section 208 complaint proceedings, which involve specific parties and not our general ratemaking authority. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as AT&T is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting NWB's argument would, in effect, transform AT&T's complaint into a class action suit on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.[75]

23. We also reject NWB's contention that a damages award to AT&T is precluded because it would drive the US West Companies' aggregated overall company-wide rate of return below the minimum necessary to raise capital and would further drive the US West Companies' aggregated overall return below confiscatory levels. Assuming *arguendo*, that such an inquiry is relevant to a Section 208 damages claim, NWB has failed to provide sufficient record evidence for the Commission to assess the impact of any damages award on its aggregated overall interstate rate of return. While NWB has provided some data in Exhibits B and C to its brief,[76] it has made no clear showing of the amount by which an award to AT&T would reduce its overall interstate earnings or rate of return. In any event, we have previously rejected NWB's claim that we must balance the excessive earnings of a particular telephone company against the underearnings of affiliated companies in the context of a private complaint for damages for the particular company's violation of a rate of return prescription.[77] We note that NWB could have chosen to develop its rates for the 1985-86 monitoring period together with its affiliated US West Companies but did not exercise its option to do so. Under these circumstances, where NWB filed rates specifically tailored to its own revenue requirement, NWB subjected itself to a separate rate of return constraint. It may not now rely on underearnings realized by the collective US West Companies to evade rate of return prescription requirements by offsetting its overearnings with the underearnings of affiliated companies.

24. We also reject NWB's contention that an award of damages to AT&T would constitute retroactive ratemaking. As we stated in the *AT&T Liability Order:*

> [E]nforcement of a rate of return prescription does not violate the rule against retroactive ratemaking for a simple reason: the obligation being enforced was set prospectively when the prescription was adopted.[78]

None of the decisions cited by NWB supports a contrary view. In fact, the court in *AT&T v. FCC* explicitly acknowledged our authority to order a carrier to disgorge earnings in excess of a rate of return prescription.[79]

25. We have carefully reviewed the arguments and evidence presented by the parties, including the calculations provided in Exhibit C to NWB's brief. We find that AT&T has made a persuasive showing that it is entitled to recover the excessive amount it paid for NWB's overall

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[72] *Id.* at 693.

[73] 245 U.S. at 533.

[74] NWB Br. at 16, citing Communications Satellite Corporation, 6 FCC Rcd 7353 (1991).

[75] Contrary to NWB's claims, we find that the Bureau did not commit reversible error when it denied as irrelevant NWB's discovery request for information from AT&T regarding the flow through of the damages it may receive in this case and the amounts it received as settlements of rate of return disputes with other carriers from which it purchased access services.

[76] Exhibit B contains a summary and compilation of information submitted in MTN's, PNB's and NWB's Forms 492 for the relevant monitoring period, a calculation of how much money USWC would have earned if its entire carrier enterprise earned exactly at a 12.75% rate of return, and the same calculation at a 13.10% rate of return. Exhibit C contains a summary and compilation of US West's over-and underearnings by company multiplied by AT&T's market share to arrive at the dollar amount by which AT&T over- or underpaid for interstate access.

[77] *AT&T Liability Order*, 5 FCC Rcd at 148, paras. 45 and 47:

> [O]ur rules permit companies to choose the level of geographic aggregation for the purposes of developing and tariffing their rates, as well as for reporting their earnings on such rates. NWB could have chosen to develop its rates together with its affiliated U S West Companies but did not exercise the option to do so. Having chosen to file rates specifically tailored to its own revenue requirement, and thereby choosing to subject itself to a separate rate of return constraint, NWB cannot now be permitted to evade that constraint and force its customers to bear the burden of unlawful rates.

5 FCC Rcd at 148, para. 47.

[78] *Id.* at 147, para. 41 [footnotes omitted].

[79] *AT&T v. FCC*, 836 F.2d at 1392.

interstate access service and that this excessive amount totals $8.727 million for the 1985-86 monitoring period.[80] NWB, on the other hand, did not provide any specific calculations or claims for offsets in its brief or reply brief. It has provided, however, as Exhibit C to its brief, a chart listing what it describes as under- and overcharges to AT&T attributable to each USWC operating company based on an earned rate of return of 13.25% during the relevant monitoring period. We have previously rejected NWB's claim that it is entitled to offset its overearnings with the underearnings of affiliated carriers. NWB has not provided any evidence that would reduce or otherwise mitigate AT&T's damages claims based on NWB's excessive earnings on overall interstate access. Accordingly, we award damages to AT&T from Northwestern Bell Telephone Company in the amount of $8.727 million. We turn now to AT&T's claim that it is entitled to interest on this damages amount.

**2. Interest on Damages**

**a. Contentions of the Parties**

26. NWB's final claim is that AT&T is not entitled to prejudgment interest because such relief is not explicitly referred to or contemplated in Sections 206-209 of the Act. According to NWB, the Commission may award AT&T interest only if it is ordering a refund under Section 204 of the Act. NWB argues that because the Commission cannot lawfully grant AT&T a refund under the facts of the instant case, no interest can be awarded on AT&T's damages.[81] Moreover, NWB argues that AT&T computed its interest pursuant to the rules for calculating interest on automatic refunds that were invalidated by the court in *AT&T v. FCC*.[82] For these reasons, NWB contends that AT&T's request for prejudgment interest must be denied.

27. AT&T argues in reply that, contrary to defendant's assertion, the Commission's authority to award interest in a complaint proceeding is well established. AT&T contends that "interest in the instant case is fully appropriate because the Commission, in prescribing a maximum permitted rate of return for the LECs...explicitly contemplated that those carriers' overearnings would be subject to interest...."[83] In fact, AT&T states, the Commission prescribed the interest rate computation to be applied to excessive earnings.[84]

**b. Discussion**

28. NWB's claim that the Commission lacks the requisite authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, our authority under Sections 4(i) and other sections of the Act to award interest in a common carrier complaint case is well established.[85] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[86] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in this case. AT&T was effectively deprived of the use of the excessive amounts it paid NWB as a result of NWB's unlawful rates while NWB, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which AT&T rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for AT&T, which paid rates higher than it would have paid had defendant earned within the prescribed level, but also to avoid any unjust enrichment of defendant stemming from its charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[87] AT&T is wrong, however, in claiming that an award of interest necessarily flows from our decisions in the CC Docket No. 84-800 proceedings and, therefore, should be computed at the rate specified in those proceedings.[88] Just as the courts' decisions regarding the validity of the rate of return mechanism and refunds under Section 204 of the Act do not guide us in this Section 208 proceeding, we are similarly not bound by interest rate computations prescribed in CC Docket No. 84-800. We conclude that interest should be computed at the IRS rate for tax refunds, not at the rate AT&T requests.[89] In addition, we find that

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[80] This amount represents AT&T's contribution to NWB's earnings above the maximum 13.10 percent rate of return prescribed by the Commission for overall interstate access service as set forth in a letter dated February 23, 1990, from Glenn Brown, Executive Director-Regulatory Operations, US WEST Communications to Barry Zahn, Assistant Vice President, AT&T (Exhibit A to AT&T's brief):

> As you know, we do not dispute that the amount of $8.727 million is the amount of dollars reflected by subtracting what AT&T might have paid Northwestern Bell, based on a earnings rate of return of 13.10%, from what AT&T did pay Northwestern Bell, which resulted in an 13.48% rate of return.

Subsequently, NWB confirmed that the $8.727 million amount "was based upon NWB earnings for the 1985-86 rate-of-return review period for interstate services provided by NWB during the same rate-of-return review period." *See* letter dated June 8, 1992 from Lawrence E. Sarjeant, Chief Counsel-Federal Regulatory, US West, Inc. to David Condit, General Attorney, AT&T. (Exhibit B to AT&T's brief.)

[81] NWB Br. at 17-18.

[82] NWB RBr. at 7.

[83] AT&T RBr. at 13.

[84] *Id.*

[85] *See* MCI Telecommunications Corporation v. American Telephone and Telegraph Company, et al., 94 FCC 2d 332, 343-46 (1983).

[86] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[87] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[88] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987).

[89] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings

interest should begin to accrue from January 1, 1987, the day after which the 1985-1986 monitoring period ended. At that point, NWB was subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[90] from Northwestern Bell Telephone Company to AT&T from January 1, 1987 until the date of full payment to AT&T.

## IV. CONCLUSION

29. We have carefully reviewed the extensive record before us and have found, to the extent indicated herein, that AT&T is entitled to an award of damages, plus accumulated interest on such damages amount, for NWB's violations of our rate of return prescription for the 1985-1986 monitoring period.

## V. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206, 207, 208, and 209, that Northwestern Bell Telephone Company SHALL PAY to AT&T Communications the sum of $8,727,000 (Eight million seven hundred twenty-seven thousand dollars) within 60 days after release of this Memorandum Opinion and Order.

31. IT IS FURTHER ORDERED that Northwestern Bell Telephone Company SHALL PAY to AT&T Communications interest on the damages awarded here at the IRS rates set forth in Appendix A from January 1, 1987 until the date full payment is made.

32. IT IS FURTHER ORDERED that the Supplement to Motion to Dismiss filed on February 14, 1992 by NWB IS ACCEPTED for filing.

33. IT IS FURTHER ORDERED that the Motion to Dismiss filed on March 31, 1988 by NWB, and the Supplemental Motion to Dismiss Complaint for Damages filed on April 11, 1990 by NWB ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**APPENDIX A**

| Effective Period | Rate | Internal Revenue Service Citation |
|---|---|---|
| 01/01/87 - 03/31/87 | 8% | Rev.Rul. 146, 1986-2 C.B. 208 |
| 04/01/87 - 06/30/87 | 8% | Rev.Rul. 87-23, 1987-13 I.R.B. 46 |
| 07/01/87 - 09/30/87 | 8% | Rev.Rul. 87-62, 1987-29 I.R.B. 10 |
| 10/01/87 - 12/31/87 | 9% | Rev.Rul. 87-87, 1987-36 I.R.B. 8 |
| 01/01/88 - 03/31/88 | 10% | Rev.Rul. 87-131, 1987-50 I.R.B. 6 |
| 04/01/88 - 06/30/88 | 9% | Rev.Rul. 88-17, 1988-10 I.R.B. 6 |
| 07/01/88 - 09/30/88 | 9% | Rev.Rul. 88-50, 1988-25 I.R.B. 39 |
| 10/01/88 - 12/31/88 | 10% | Rev.Rul. 88-86, 1988-41 I.R.B. 1 |
| 01/01/89 - 03/31/89 | 10% | Rev.Rul. 88-105, 1988-51 I.R.B. 4 |
| 04/01/89 - 06/30/89 | 11% | Rev.Rul. 89-36, 1989-1 C.B 309 |
| 07/01/89 - 09/30/89 | 11% | Rev.Rul. 89-69, 1989-1 C.B. 310 |
| 10/01/89 - 12/31/89 | 10% | Rev.Rul. 89-99, 1989-2 C.B. 256 |
| 01/01/90 - 03/31/90 | 10% | Rev.Rul. 89-125, 1989-2 C.B. 257 |
| 04/01/90 - 06/30/90 | 10% | Rev.Rul. 90-19, 1990-1 C.B. 186 |
| 07/01/90 - 09/30/90 | 10% | Rev.Rul. 90-47, 1990-1 C.B. 187 |
| 10/01/90 - 12/31/90 | 10% | Rev.Rul. 90-71, 1990-35 I.R.B. 4 |
| 01/01/91 - 03/31/91 | 10% | Rev.Rul. 90-94, 1990-46 I.R.B. 16 |
| 04/01/91 - 06/30/91 | 9% | Rev. Rul. 91-20, 1991-11 I.R.B. 1 |
| 07/01/91 - 09/30/91 | 9% | Rev.Rul. 91-33, 1991-21 I.R.B. 1 |
| 10/01/91 - 12/31/91 | 9% | Rev.Rul. 91-50, 1991-37 I.R.B. 1 |
| 01/01/92 - 03/31/92 | 8% | Rev.Rul. 91-65, 1991-51 I.R.B. 1 |
| 04/01/92 - 06/30/92 | 7% | Rev.Rul. 92-21, 1992-14 I.R.B. 14 |
| 07/01/92 - 09/30/92 | 7% | Rev.Rul. 92-44, 1992-24 I.R.B. 86 |
| 10/01/92 - 12/31/92 | 6% | Rev.Rul. 92-77, 1992-38 I.R.B. 12 |

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under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

[90] The applicable IRS rates are set forth in Appendix A.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 92-101**

In the Matter of

Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions"

Bell Atlantic Tariff F.C.C. No. 1 — Transmittal Nos. 497, 536

US West Communications, Inc. Tariff F.C.C. Nos. 1 and 4 — Transmittal No. 246

Pacific Bell Tariff F.C.C. No. 128 — Transmittal No. 1579

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 22, 1993; Released: January 22, 1993**

By the Commission: Chairman Sikes not participating.

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## I. INTRODUCTION

1. Bell Atlantic Telephone Companies (Bell Atlantic), US West Communications, Inc. (US West), and Pacific Bell (Pac Bell) filed the above-captioned tariffs to increase the limits set on their rates under the price cap plan, in order to recognize accounting changes for postretirement employee benefits, primarily medical benefits.[1] The accounting change is referred to as SFAS-106. On April 29, 1992, the Common Carrier Bureau suspended the Bell Atlantic and US West tariffs[2] for five months and designated for investigation issues arising from the carriers' claim that the incremental change in accounting cost should be treated as a one-time exogenous cost change under price caps. Based on the record in this investigation, we find that these local exchange carriers (LECs), and the other price cap LECs designated as parties in this proceeding, have not met their burden of demonstrating

[1] *See* Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 497 (Filed Feb. 28, 1992 to be effective July 2, 1992); US West Communications, Inc. Tariff F.C.C. Nos. 1 and 4, Transmittal No. 246 (Filed Apr. 3, 1992 to be effective August 1, 1992); Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1579 (Filed Apr. 16, 1992 to be effective January 1, 1993).

Effective November 25, 1992, under Transmittal No. 534, Bell Atlantic withdrew Transmittal No. 497. Subsequently, on December 4, 1992, under Transmittal No. 536, Bell Atlantic refiled the same material it had previously withdrawn, with a revised effective date of January 1, 1993.

[2] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers

that implementation of SFAS-106 should be considered an exogenous cost change under the Commission's price cap rules. We thus find the tariffs unlawful and direct the three carriers to refund the rate increases assessed under these tariffs. We do not foreclose these carriers or others from making a more persuasive showing in the context of the 1993 annual access tariff filings.

## II. BACKGROUND

### A. SFAS-106

2. In December 1990, the Financial Accounting Standards Board (FASB) adopted Statement of Financial Accounting Standards - 106 (SFAS-106). For those companies subject to Generally Accepted Accounting Standards (GAAP), SFAS-106 establishes new financial accounting and reporting requirements for accounting periods beginning after December 15, 1992, for any employer offering postretirement benefits other than pensions (OPEBs) to its employees. OPEBs are typically health and dental care benefits and life insurance.

3. Prior to implementation of SFAS-106, OPEBs have been accounted for on a "pay-as-you-go" or cash basis, recognizing the amounts actually paid in the current accounting period for the benefit of retired employees. SFAS-106 requires companies to account for OPEBs on an accrual basis, treating OPEBs as a form of deferred compensation earned by employees during their working years.

4. In addition to the change to accrual accounting, SFAS-106 also requires companies to recognize on their books the amount of their unfunded obligation for OPEBs to retirees and active employees existing as of the date of the adoption of SFAS-106. This unfunded obligation is referred to as the transition benefit obligation (TBO). SFAS-106 permits companies whose plans have active participants to either recognize the TBO as an immediate expense or defer and amortize it over the average remaining service period of active plan participants. If the average remaining service period is less than 20 years, the employer may elect to use a 20-year period.

### B. Common Carrier Bureau SFAS-106 Adoption Order

5. Since 1985, the Commission has implemented a policy of conforming regulatory accounting to GAAP, including new FASB standards, unless adoption of the principle or practice conflicts with the Commission's regulatory objectives. *See* 47 C.F.R. § 32.16.

6. In December, 1991, the Common Carrier Bureau issued an Order approving the requests of two LECs to adopt SFAS-106-type accounting for OPEB, on or before January 1, 1993.[3] However, noting that an immediate recognition of the TBO would be so large as to distort the LECs' operating results, the Bureau declined to allow carriers to adopt the FASB option of flash-cut accounting for the TBO. Instead, the Bureau authorized the carriers to use the other SFAS-106 option of spreading the TBO over a 20-year period or over the average remaining service period of active plan participants.[4]

### C. *Price Caps and Changes in GAAP*

7. In its price cap decisions,[5] the Commission replaced cost-plus rate of return regulation with an incentive-based system of regulation that rewards carriers whose performance exceeds a benchmark measure of efficiency improvements. The benchmark, known as the price cap index or PCI, is adjusted each year based on inflation in the economy (Gross National Product Price Index, or GNP-PI), minus a productivity factor.[6] The productivity factor is set to reflect the historical productivity growth of the telephone industry, which has exceeded the productivity of the economy as a whole, plus a 0.5 percent Consumer Productivity Dividend. Taken together, these factors established a reasonable, "rough justice" target of efficiency growth, based on historical trends. Carriers that are able to generate productivity gains in excess of the target will generate earnings higher than those experienced under rate of return regulation. Carriers also benefit

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Accounting for Postretirement Benefits Other Than Pensions," CC Docket No. 92-101, 7 FCC Rcd 2724, n.3 (Com. Car. Bur. 1992)(*Suspension and Investigation Order*).

On December 31, 1992, the Common Carrier Bureau released an Order suspending Pacific Bell Transmittal No. 1579 and Bell Atlantic Transmittal No. 536 for one day and adopted an accounting order directing all three carriers to keep accurate account of all amounts received by reason of the increased charge, in the event that refunds might eventually be ordered. Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions," ___ FCC Rcd _____ (Com. Car. Bur. 1992).

[3] *See* Southwestern Bell Corporation, GTE Service Corporation, Notification of Intent to Adopt Statement of Financial Accounting Standards No. 106, Employer's Accounting for Postretirement Benefits Other Than Pensions, 6 FCC Rcd 7560 (Com. Car. Bur. 1991)(*SFAS-106 Order*).

[4] *Id. See also* Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32 (May 4, 1992) (*RAO Letter 20*).

[5] *See* Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice, 4 FCC Rcd 3379 (*AT&T Price Cap Order*), *modified on recon.*, 6 FCC Rcd 665 (1991)(*AT&T Price Cap Reconsideration Order*), *appeal docketed, AT&T v. FCC*, No. 91-1178 (D.C. Cir. Apr. 15, 1991); Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990)(*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991)(*LEC Price Cap Reconsideration Order*), *recon. dismissed*, FCC 91-344, released December 20, 1991, *further modified on recon.*, 6 FCC Rcd 4524 (1991)(*ONA Part 69 Order*) , *petitions for recon. of ONA Part 69 Order pending, appeal docketed, District of Columbia PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991); Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991)(*Interexchange Order*) (further streamlining and removing from price cap regulation most of AT&T's business services), *on recon.*, 7 FCC Rcd 2677 (1992).

[6] The price cap rules mandate a productivity offset of 3.3 percent, and include in the cap mechanism a means of inducing LECs to pursue even higher productivity gains if possible. LECs may elect to set their price caps by using a 4.3 percent productivity offset. Election of the higher productivity offset lowers the price cap, thereby benefitting ratepayers. However, election of the higher offset permits the LECs to retain a larger share of its earnings, thereby benefitting the LEC if it can increase its productivity. *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2641.

because price cap regulation provides increased rate flexibility and is simpler to administer. Ratepayers benefit because the benchmark is designed to decrease rates relative to inflation at a faster pace than rates have historically decreased.

8. In recognition of the difficulty in determining a single, industry-wide productivity offset that will be accurate for all LECs, the Commission adopted sharing and adjustment mechanisms to adjust rates in the event of unanticipated errors in the price cap formula.[7] Beginning at 12.25 or 13.25 percent, depending on the productivity offset or the amount of initial price decreases selected by the LEC,[8] the sharing mechanism requires LECs to share one half of its profits with its customers. At either 16.25 or 17.25 percent, all profits will be returned to customers.[9] Correspondingly, the Commission also established a low-end adjustment mechanism to ensure that the application of the price cap plan does not subject any individual LEC to low earnings over a prolonged period of time.[10] Should a carrier's earnings drop below 10.25 percent, the low-end adjustment will permit a carrier an automatic prospective upward adjustment in its PCI the following year.[11]

9. The Commission also identified certain cost changes, triggered by administrative, legislative, or judicial action that are beyond the control of the carriers, that should result in an adjustment to the PCI in order to ensure that the price cap formula does not lead to unreasonably high or unreasonably low rates.[12] The Commission found that a decision not to recognize these costs in the PCI would either unjustly punish or reward the carrier by treating them as changes in the carrier's level of efficiency.[13] The Commission called these costs "exogenous" or Z factor costs.

10. The Commission determined, however, that not all changes beyond the carrier's control are considered exogenous. For example, a general change in tax rates is outside of the carrier's control, but will be reflected in the national GNP-PI component of the price cap formula.[14] Exogenous treatment of the tax change would thus unfairly "double count" its impact, once in the GNP-PI, and again as an exogenous cost. The Commission concluded that only changes that "uniquely or disproportionately affect LECs" would be considered for exogenous treatment.[15]

11. Section 61.45(d) of the Commission's Rules lists the exogenous cost changes under the Commission's price cap plan. Examples of cost changes considered exogenous are Commission-mandated amortization of reserve deficiencies and Long Term Support payments and receipts. Changes in GAAP, the action that triggered these tariff revisions, are not listed in this section and thus are not given routine exogenous cost treatment. In the *AT&T Price Cap Reconsideration Order*, however, the Commission recognized that not all GAAP changes will be reflected in the GNP-PI, and therefore stated that carriers may request exogenous treatment of GAAP changes. Carriers requesting such treatment, however, would bear the burden of demonstrating that the particular change would not be adequately reflected in GNP-PI.[16]

**D. LEC OPEB Tariffs**

12. In the transmittals under investigation, Bell Atlantic, US West, and Pac Bell claim that the incremental costs of implementing SFAS-106 should be reflected as exogenous cost changes under the Commission's price cap plan, allowing them to increase their PCIs, and thus their rates.[17] These LECs contend that the accounting change is mandatory and thus outside of their control and that the revised accounting results in a cost increase not otherwise reflected in the GNP-PI. In support of their claim that implementation of SFAS-106 disproportionately affects price cap LECs when compared to the economy as a whole, these LECs submitted industry-wide studies.[18]

**E. Common Carrier Bureau Suspension and Investigation Order**

13. In response to these tariff filings the Common Carrier Bureau issued its *Suspension and Investigation Order*.[19] Noting that the threshold issue presented by these transmittals -- whether costs of SFAS-106 should be treated as exogenous costs -- is important to the price cap plan, the *Order* set the tariffs for investigation. Because the proposed rate increases are substantial and based on complex arguments and studies, the Bureau also suspended the Bell Atlantic and US West tariffs for five months pending completion of this investigation.[20] Moreover, since the studies submitted by the three carriers address the effects of SFAS-106 on all local telephone companies subject to price caps, and the Commission's price cap plan applies equally to all price cap LECs, the Bureau designated all price cap LECs as parties to this proceeding, including those LECs who have not at this point sought exogenous treatment of SFAS-106 effects.

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[7] *LEC Price Cap Order*, 5 FCC Rcd at 6802.

[8] *See supra* note 7.

[9] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2676.

[10] *LEC Price Cap Order*, 5 FCC Rcd at 6801.

[11] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2676; *LEC Price Cap Order*, 5 FCC Rcd at 6801-02.

[12] *LEC Price Cap Order*, 5 FCC Rcd at 6807; *citing AT&T Price Cap Order*, 4 FCC Rcd at 3187.

[13] *LEC Price Cap Order*, 5 FCC Rcd at 6807.

[14] *LEC Price Cap Order*, 5 FCC Rcd at 6808.

[15] *Id.*

[16] *AT&T Price Cap Reconsideration Order*, 6 FCC Rcd at 674; Price Cap Reconsideration Order, 6 FCC Rcd at 2663-65. These Orders did not address issures involving costs reflected in orhter parts of the PCI.

[17] As a result of implementing SFAS-106, Bell Atlantic seeks to increase its price cap index levels $48.9 million (an average of approximately 1.8 percent) for the period January 1, 1991 through June 30, 1993. US West seeks to increase its price cap index levels $19.03 million (1.0 percent) for the period January 1, 1993 through June 30, 1993. Pac Bell seeks to increase its price cap index levels $27 million (1.9 percent) for the period January 1, 1993 through June 30, 1993. These increases in the PCIs would permit these carriers to recover these amounts from ratepayers not only for the years listed above, but for all following years.

[18] United States Telephone Association (USTA), "Post-Retirement Health Care Study Comparison of TELCO Demographic and Economic Structures and Actuarial Basis to National Averages" (1992)(Godwins Study) (submitted in Bell Atlantic and US West transmittals); National Economic Research Associates, Inc., "The Treatment of FAS-106 Accounting Changes Under FCC Price Cap Regulation" (1992)(NERA Study)(submitted in Pac Bell transmittal).

[19] *See supra* note 2.

[20] *See supra* notes 1 and 2.

14. The Bureau designated the following issues for investigation: 1) whether the LECs have borne their burden of demonstrating that implementing SFAS-106 results in an exogenous cost change under the Commission's price cap rules; and 2) if these cost changes are treated as exogenous: (a) should costs associated with implementation of SFAS-106 prior to January 1, 1993 (when the accounting change becomes mandatory) be treated as exogenous; (b) are the assumptions made by the individual LECs in calculating these costs reasonable; (c) given these assumptions, have the individual LECs correctly computed the exogenous cost changes; and (d) are the individual LEC allocations of these costs among the price cap baskets consistent with Commission rules.[21] In order to develop as complete a record as possible to resolve the issues designated for investigation, the Bureau also requested the filing of specific, detailed information by all LECs made parties to the investigation.[22]

## III. PLEADINGS

### A. Direct Cases

#### i. Exogenous Claims

15. The LECs contend that the cost change required to implement SFAS-106 should be afforded exogenous treatment under the Commission's price cap plan because the cost change: (1) is mandatory and outside of their control; (2) is not fully reflected in the measure of inflation in the price cap formula (GNP-PI); (3) disproportionately affects the LECs; and (4) will not otherwise undermine the Commission's price cap policies. More specifically, the LECs argue that since the Common Carrier Bureau concluded in the *SFAS-106 Order* that adoption of SFAS-106 is consistent with the Commission's regulatory objectives, this finding indicates that SFAS-106 costs are an appropriate regulatory cost of service. Furthermore, the LECs claim that they have done all that can be reasonably expected to minimize these costs.[23]

#### ii. Godwins and NERA Studies

16. The LECs' direct cases particularly focus on the extent to which implementing SFAS-106 will be reflected in the GNP-PI. These LECs commissioned the Godwins and NERA studies to support their contention that implementation of SFAS-106 disproportionately affects price cap LECs, and that exogenous treatment would cause little or no double counting.[24]

##### a. Godwins Study

17. The Godwins Study is based on the assumption that the SFAS-106 accounting change creates a cost change for LECs and other firms, and the Study seeks to quantify the extent to which the effect of this change for price cap LECs is double-counted in GNP-PI. The Study consists of two parts; an actuarial analysis and a macroeconomic model. The actuarial analysis constructs a hypothetical company (TELCO) which is based on data from most price cap LECs. For TELCO and the economy as a whole (GNP), the Study computes a Benefit Level Indicator (BLI), the proportion of OPEB charges paid by the employer. This BLI is 0.5850 for TELCO and 0.2568 for GNP. The ratio of GNP BLI to TELCO BLI, which is 0.4390, which the Study claims is the portion of TELCO's SFAS-106 costs that would be reflected in the GNP-PI, if the OPEB conditions were the same for the average TELCO and the economy as a whole. However, these conditions are not the same and Godwins therefore makes several adjustments to this ratio.

18. First, demographic adjustments are made to reflect the facts that, on average, TELCO employees are older, leave the company before retirement less often, and retire at a younger age than do employees in GNP. Second, TELCO has a higher retiree/employee ratio than does GNP. Third, TELCO has pre-funded some of its SFAS-106 obligation, through Voluntary Employee Benefit Association (VEBA) trusts. The Godwins Study assumes that GNP did not pre-fund at all. Fourth, a higher proportion of TELCO employees are covered than are covered in GNP. Fifth, TELCO has higher per-unit labor costs. Finally, even though TELCO's per-unit labor costs are higher, total labor costs are a lower percentage of TELCO's costs than of GNP's. After these adjustments, the GNP/TELCO BLI ratio is 0.2833, which means that the average employer in the GNP will see its costs rise due to SFAS-106 by only 28.33 percent of the cost rise experienced by TELCO.

19. To determine the portion of the cost change due to SFAS-106 which will be passed through into GNP-PI, Godwins employs a mathematical macroeconomic model. This model divides the economy into two sectors, one which provides OPEB and one which does not. The values of several parameters in the model (such as the elasticity of supply of labor and the cross elasticity of goods in the two sectors) are assumed, based on a survey of economic studies of these values. The values of the remaining parameters are selected to make the model conform to the current economy.

20. SFAS-106 is assumed to increase labor costs in the sector which offers OPEB by 3 percent.[25] The model estimates that, after the economy has adjusted to SFAS-106,

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[21] *Suspension and Investigation Order*, 7 FCC Rcd at 2725-26.

[22] *Id.* at 2726.

[23] *See* Southwestern Bell Telephone Company (SWBT) Direct Case at 12. We note here that two LECs claim that the Commission previously stated that additional costs recognized as a result of implementing SFAS-106 would likely be exogenous costs. Bell Atlantic Direct Case at 2; BellSouth Corporation and BellSouth Telecommunications, Inc. (BellSouth) Direct Case at 6. *Citing*, AT&T Tariff Order, 5 FCC Rcd 3680 (Com. Car. Bur. 1990) That Bureau Opinion is not binding on the Commission and the discussion of possible exogenous treatment of "costs" resulting from implementation of SFAS-106 is, at most, speculative dicta. Since SFAS-106 was not adopted at that time, the issue was not ripe for consideration. *See also LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2663-65.

[24] Except for Rochester Telephone Company (Rochester) and Pac Bell, all of the price cap LECs submitted the Godwins Study in support of their direct cases. Rochester and Pac Bell submitted the NERA Study in support of their direct cases.

[25] This is based on the change in TELCO's labor costs, adjusted for the demographic differences between TELCO and GNP.

by changing prices, output, labor and capital, GNP-PI will rise by only 0.01236 percent. However, one of the adjustments made in the economy is to lower the wage rate, as firms adjust their compensation packages to reflect the higher OPEB costs. The Study estimates that the combined effect of the change in the wage rate and the flow-through in the GNP-PI of the SFAS-106 change is that only about 15 percent of the cost increase due to SFAS-106 for LECs will be recovered without an exogenous change. Specifically, Godwins concludes, 84.8 percent of LEC OPEB increase due to SFAS-106 should be reflected as an exogenous cost change under price caps.[26]

**b. NERA Study**

21. The NERA Study assumes that SFAS-106 more nearly reflects true economic costs than does pay-as-you-go accounting, and thus reasons that the economic theory of efficient markets implies that these economic costs have already been recognized in prices of firms operating in such markets. By contrast, according to NERA, regulated firms such as the LECs have charged prices based on their accounting costs, which recognized OPEBs on a pay-as-you-go basis. Based on this reasoning, NERA divides the U.S. economy into two sectors; a cost-plus (price regulated) sector and all other industries. The cost-plus sector includes utilities (telephone, gas, water, etc.) and all government contracts (on the assumption that the latter are all cost-plus contracts).[27] The cost-plus sector so defined makes up 10.49 percent of the GNP. The NERA Study assumes that only this cost-plus sector will pass through the effects of SFAS-106 in its prices; the other 90 percent of the economy is assumed to be already reflecting the effects of SFAS-106 in its prices.

22. The economy-wide effect of SFAS-106 is estimated at $69 billion, in a GNP of $6,260 billion, or about 1.10 percent of GNP. Assuming this 1.10 percent change applies to the cost-plus sector, the effect on GNP-PI is thus 10.49 percent of 1.10 percent, or a 0.12 percent increase. In other words, the NERA Study concludes that SFAS-106 will increase GNP-PI by 0.12 percent but will increase costs to LECs by 1.1 percent. Thus, according to NERA, only about 7 percent of the effect of SFAS-106 on the price caps will be recognized in the GNP-PI, and the remainder should be allowed as an exogenous adjustment.

**B. Oppositions**

23. Oppositions were filed by Ad Hoc Telecommunications User Committee (Ad Hoc), American Telephone and Telegraph Company (AT&T), International Communications Association (ICA), and MCI Telecommunications Corporation (MCI). Ad Hoc, ICA and MCI claim that the costs of implementing SFAS-106 should not receive exogenous treatment. Generally speaking, these opposing parties believe that affording exogenous treatment of these cost changes conflicts with price cap policies because such action interferes with the orderly administration of the Commission's price cap system and will disrupt the balance of risk and reward inherent in the price cap system. AT&T, which in the past has sought exogenous treatment of SFAS-106 in its own price cap plan,[28] states that the accounting change should be considered an exogenous cost change, but only within the specific limits discussed below.

24. As a threshold matter, MCI, Ad Hoc and ICA argue that while the lack of control over the FASB ruling is apparent, the LECs make no case as to why the *effect* of SFAS-106 is exogenous, and outside of their control. MCI states that SFAS-106 is nothing more than an accounting change that alters the temporal recognition of costs on financial statements. The implementation of SFAS-106, asserts MCI, does not, by itself, alter the underlying economic costs of providing interstate telecommunications services, but rather formally recognizes costs *already* being incurred by the LECs.[29] MCI asserts that the Commission must therefore reject this attempt to manipulate the price cap rules to minimize risk while maximizing earnings.[30] The price cap LECs, MCI states, would receive perverse incentives to reduce the cash wage rate since they could increase their earnings while recovering the costs of the substitute through exogenous SFAS-106 adjustment.[31] The interrelationship of both wage and benefit expenses, says MCI, precludes the treatment of one form of labor compensation -- SFAS-106 related costs -- as exogenous and the other as endogenous.[32]

25. All four of the opposition argue that if exogenous treatment is allowed for this accounting change, the proposed PCI adjustments must be reduced because the LECs have all overstated their exogenous claims. Economics and Technology, Inc. (ETI) was retained by Ad Hoc to analyze the direct cases and the Godwins and NERA studies. ETI reports that LECs can, to some extent, strategically manipulate costs categorized as exogenous.[33] Moreover, it states that the SFAS-106 accrual process includes very liberal and generous provisions accepting many actuarial estimates of future OPEB effects.[34] For example, the carrier must project discount rates, returns on plan assets, medical care cost trends and demographic features. In short, Ad Hoc and ETI argue that the costs of implementing SFAS-106 would be determined, in large part, by unverifiablep "actuarial and demographic assumptions.[35] AT&T agrees, stating that because SFAS-106 accrual is inherently imprecise and measurement of its impact is extremely difficult to assess, it is not possible to

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[26] Bell Atlantic, which relies on the Godwins Study, does not adjust its exogenous request to reflect a decrease in the wage rate. It therefore seeks as an exogenous cost change almost 100 percent of its OPEB increase due to SFAS-106.

[27] NERA claims that its assumption that all government contracts are cost-plus is a conservative one, which inflates the cost-plus sector and may result in a larger effect on GNP-PI of SFAS-106 than may actually be the case.

[28] AT&T Tariffs F.C.C. Nos. 1, 2 and 13, 5 FCC Rcd 3680 (Com. Car. Bur. 1990).

[29] MCI Opposition at 10.1

[30] *Id.* at 11.

[31] *Id.* at 10.

[32] *Id.* at 2.

[33] AT&T echoes this conclusion stating, "although SFAS-106 accounting treatment is mandatory (citation omitted), the underlying OPEB expense is *not* totally outside of the LECs' control and the LECs should be provided with the proper incentives to become more efficient in this area." AT&T Opposition at 17.

[34] Ad Hoc Opposition at 13; ETI Report at 8.

[35] ETI Report at 2, 8-9, 28, *See also* MCI Opposition at 27.

predict fully how SFAS-106 will affect prices in the economy generally (as both Godwins and NERA attempt to do).[36]

26. Moreover, the opposition allege, these unverifiable assumptions would require the Commission to resolve a number of disputes regarding the actuarial and demographic assumptions underlying the carriers' PCI adjustments. ICA argues that these were the very types of disputes price caps was intended to eliminate.[37] The inherent flaws in these studies, AT&T maintains, render the measurement of the GNP-PI impact unreliable.[38] The opposition maintain that all of the uncertainty surrounding the studies and the LEC SFAS-106 amounts compel a Commission finding that the LECs have not met their burden of proving that no double counting would occur as a result of giving exogenous treatment to their implementation of SFAS-106.[39]

27. For example, MCI and ETI contend that the LECs have failed to quantify some significant portion of SFAS-106 costs that have already been captured by the cost of equity calculations conducted by the Commission in the rate of return proceeding.[40] MCI attaches an affidavit by Professor Allan Drazen that concludes that the LECs and shareholders have already been at least partially compensated for costs associated with accrual of SFAS-106 costs.[41] Because experience indicates that knowledge concerning the costs of SFAS-106 was embedded in share prices prior to the final adoption of SFAS-106, and the Commission used these share prices to determine the cost of equity for the LECs, MCI states the LECs must quantify this amount and reduce their corresponding SFAS-106 amounts for which they desire exogenous treatment.[42] Any attempt to include these amounts again, MCI alleges, would result in double recovery.

28. Additionally, MCI states that since SFAS-106 expenses will be accruing over several decades before the expected disbursement of these funds, LECs would enjoy the use of ratepayer funds used to cover these accruals. Should the Commission afford exogenous treatment, MCI asks that the Commission establish special reporting requirements to track the flow of funds and the resulting assets for OPEBs, and further require that the LECs not use the funds collected from ratepayers except for covering SFAS-106 costs.[43]

29. Finally, MCI notes that neither study addresses the low-end adjustment formula and how it relates to this case. This is a key omission, says MCI, because the low-end adjustment formula would serve as an adequate transition mechanism if price cap LECs do not receive exogenous treatment.[44] MCI states that the low-end adjustment will serve as a backstop for the LEC earnings in the first year or two following the FASB ruling's becoming effective as the LECs attempt to minimize the cost impacts of SFAS-106, and will protect the LECs from inordinately sharp drops in earnings.[45]

30. AT&T suggests that the Commission develop an alternative approach to these issues by adopting certain limitations on SFAS-106 accruals for exogenous treatment. Limitations, say AT&T, are appropriate to provide price cap LECs incentives to become more efficient in their management of OPEB expenses because they are to some degree within the control of the LECs,[46] the amounts are highly speculative,[47] and full exogenous treatment SFAS-106 amounts could give the LECs an unearned windfall.[48] AT&T explains that while SFAS-106 is good for accounting purposes because it reveals OPEB liabilities to shareholders, affording exogenous treatment for the same amount requires more scrutiny because exogenous treatment of the effects of SFAS-106 would immediately impact prices. Imposing limitations on exogenous treatment of SFAS-106 accruals, alleges AT&T, would protect ratepayers from paying for accruals based on OPEB benefits levels that may never be paid by the LECs.[49] If exogenous claims are overstated, AT&T explains, there is no price cap mechanism for making the ratepayer whole again as the price cap rules would treat any savings that are realized as an apparent productivity gain.[50]

31. Given the imprecise nature of SFAS-106 and the difficulty, if not impossibility, of assessing its impact upon particular companies, AT&T urges the Commission to establish uniform assumptions, or parameters, to govern exogenous claims. This alternative approach, says AT&T, would be both simpler and more reliable a means for ensuring no double counting and would avoid the numerous unverifiable assumptions used in the Godwins and NERA studies.[51] Then, as a safeguard to ensure that the amounts paid by ratepayers are used only for their intended purpose, AT&T proposes that only OPEB costs that are prefunded should be considered for exogenous treatment.[52] Without this, AT&T says, nothing would prevent the LECs from recovering SFAS-106 accrual amounts, then reducing or refusing to pay benefits at all in the future.[53] AT&T notes that, of the several funding vehicles available, the tax effective ones, such as IRS Code Section 501(c)(a) VEBA Trusts, 26 U.S.C. § 501(c)(a), generally forbid removal or transfer of funds except for the purpose for which they were established.

### C. Replies

32. The LECs reply that exogenous treatment is warranted because the incremental cost increase due to the adoption of SFAS-106 is the result of actions beyond the

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[36] AT&T Opposition at 12-13.
[37] ICA Opposition at 1.
[38] AT&T Opposition at 12.
[39] *See Id.* at 7.
[40] MCI Opposition at 2, 11.
[41] *Id.* at 12, Appendix A.
[42] *Id.* at 17.
[43] *Id.* at 11.
[44] *Id.* at 23.
[45] *Id.* at 24.
[46] AT&T Opposition at 20-21.
[47] *Id.* at 21-23.
[48] *Id.* at 24.
[49] AT&T Opposition at 29. Indeed, AT&T and the other opposition parties all point out that estimates under SFAS-106 are not legally binding and do not reflect a carrier's actual funding obligation. Ad Hoc Opposition at 13; AT&T Opposition at 14-16; MCI Opposition at 7-8.
[50] *See, e.g.*, AT&T *ex parte* comments in CC Docket 92-101 (September 2, 1992).
[51] AT&T Opposition at 14.
[52] *Id.* at 14. *See also* MCI Opposition at 8.
[53] AT&T Opposition at 7.

control of the LECs and would not be reflected in other components of the PCI. The LECs explain that they do not seek exogenous treatment for a change in the level of benefits, but for the one-time accounting change.[54] Thus, they argue, the fact that the LECs have some control over OPEB expenses does not preclude exogenous treatment, because they have no control over the recognition of this liability on their books or the method of calculating costs associated with SFAS-106.[55]

33. The purpose of SFAS-106, the LECs believe, was to mandate the recognition of actual, unrecovered costs that employees earned but that were not reflected in employer's financial statements under pay-as-you-go accounting. The LECs argue that unless exogenous treatment is also afforded, they will be permanently denied recovery of costs that were prudently incurred in the provision of service to ratepayers.[56] Rochester argues that SFAS-106 accrual amounts are precisely the amounts that would have been embedded in initial price cap rates had SFAS-106 been mandated prior to initiation of price caps.[57] Rochester agrees with the opponents, unlike the other LECs, that the accounting change SFAS-106 does not increase the true economic costs of employee compensation, but argues that this is irrelevant because the NERA Study demonstrates that regulated firms, unlike firms that are not price regulated, have been able to reflect only the accounting costs of OPEBs in their prices.[58]

34. Some of the LECs argue that MCI's rate of return argument[59] is either irrelevant[60] or at least incorrectly assumes that a purported drop in stock prices associated with the adoption of SFAS-106 was caused by an increase in the cost of capital.[61] To the extent that a change in stock prices did occur investor expectations regarding growth in earnings or dividend payment charges must also be considered.[62] Thus, MCI's underlying argument here ignores a more rational cause; that changes in the cost of capital are caused by changes in risks, not simply by a change in stock price.[63]

35. The LECs also claim that although the companies must estimate their accrual expenses for OPEBs, these estimates are not so uncertain as to justify not implementing the accounting change or rejecting exogenous cost treatment. The actuarial assumptions used are said to be used by the insurance industry for pensions and other costs,[64] limited by the guidelines prescribed by SFAS-106,[65] and a normal part of accrual accounting.[66] US West contends that the opponents' argument that OPEB costs can be changed at will is a gross oversimplification, arguing that the opponents ignore the large portion of costs related to the TBO, which is a liability based on past commitments.[67]

36. Additionally, the LECs argue that the limitations proposed by the opponents would be arbitrary and capricious.[68] For example, these parties say that the creation of a uniform set of FCC-mandated assumptions neglects the fact that the actuarial assumptions upon which the accounting levels are based are, for the most part, founded on experience within the company or the industry, arecollected and prepared over a long period of time, and are otherwise consistent with SFAS-106.[69] Various LECs assert that individual LEC demographic data and medical cost trends are necessary to render the calculations valid.[70]

37. Moreover, the LECs maintain that exogenous claims should not be limited to prefunding for OPEB accruals.[71] As with any other accrual expense, they explain, recognition and funding are wholly independent events and they should remain so. Funding the obligation, these price cap LECs claim, is based on management's decisions about the best use of corporate assets, while recognition of SFAS-106 costs flows from the adoption of the accounting change of an increased current expense on the company's books.[72] Further, they state that no such mandatory prefunding is necessary to protect ratepayers. Ratepayer protection, United explains, is provided for by the Commission in *RAO Letter 20*,[73] where the Commission required a LEC's rate base to be reduced by the amount of any unfunded accrued postretirement benefits.[74] A prefunding requirement, maintains United, would require it to borrow funds and incur costs to cover the portion of funding not deductible for tax purposes.[75]

38. Recognizing there may be a need to ensure that LEC claims will not be unreasonable in the future due to significant unforeseen factors, SWBT states that it would not object to a true-up of SFAS-106 liability if major changes occur.[76] US West also would accept an annual true-up to ensure that significant changes in actuarial assumptions will not result in a windfall to LECs. US West states that the true-up should address only those costs associated with the TBO on January 1, 1993. Costs associated with *future service cost* should not be included, presumably because these are within the control of the LEC.[77] Other LECs, like Ameritech, oppose a true-up mechanism because such a mechanism would impose an unreasonable burden on the LECs and the Commission to track these costs indefinitely.[78]

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54 BellSouth Reply at 11; Ameritech Reply at 12.
55 *E.g.*, Ameritech Reply at 4, 5.
56 BellSouth Reply at 6.
57 Rochester Reply at 4.
58 *Id.* at 5, *citing* NERA Study at 17-18.
59 *See supra* para. 27.
60 US West Reply at 11.
61 United States Telephone Association (USTA) Reply at 5.
62 Rochester Reply at 5.
63 USTA Reply at 5.
64 BellSouth Reply at 19-20.
65 Ameritech Reply at 9.
66 GTE Reply at 6-7.
67 US West Reply at 9.
68 Rochester Reply at 6.
69 *Id.*; Southern New England Telephone Co. (SNET) Reply at 5; Ameritech Reply at 20; BellSouth Reply at 20-24.
70 Bell Atlantic Reply at 15; BellSouth Reply at 29; SNET Reply at 6.
71 GTE Service Corporation (GTE) Reply at 23-25; New England Telephone and New York Telephone Company (NYNEX) Reply at 32; Rochester Reply at 6.
72 SNET Reply at 7; SWBT Reply at 13; Rochester Reply at 28.
73 *See supra* note 5.
74 United Telephone System companies (United) Reply at 5.
75 *Id.* at 4.
76 SWBT Reply at 45.
77 US West Reply at 18.
78 Ameritech Reply at 19.

39. Finally, Rochester disputes MCI's argument that the low-end adjustment mechanism is an appropriate backstop for LEC earnings in the first year or two of the FASB ruling. It argues that the treatment of certain costs as exogenous and the lower end sharing mechanisms exist conterminously. Rochester does not believe that the Commission intended for one to replace the other.[79]

## IV. DISCUSSION

40. For the reasons set forth below, we find that the LECs have failed to meet their burden of proof in this investigation and we deny the LECs' request for exogenous treatment of SFAS-106 expenses in these transmittals. We therefore find the specific tariffs filed by US West and Pac Bell unlawful in this investigation, and we also conclude that all price cap LECs who have been parties to this proceeding have failed to meet their burden of demonstrating that exogenous treatment should be afforded for this GAAP change.[80]

41. We are very sensitive to the needs of these, and all companies, that want to provide health care benefits for their employees. Therefore, we would like to make clear that our decision here does not in any way restrict LECs from providing adequate health care benefit packages to their employees. Nor does our decision require these companies to cut back their benefits to their employees. As discussed below, our price cap plan will permit recovery of current and future LEC OPEB expenses. In the face of rising health care costs these LECs, through the incentives built into our price cap regime, will only be subject to the same risks and rewards that all U.S. companies face in making their decisions to provide these benefits to their employees.

### A. Introduction

42. The price cap plan creates incentives and constraints similar to those in competitive marketplaces, where companies face greater risks, but also can achieve greater profits by operating more efficiently than their rivals. Under price caps, LECs similarly bear the risk of lower profits than under cost-plus rate of return regulation, but are given the incentive of potentially higher earnings for efficiency gains above the historical norm. They are also constrained, and their customers protected, by the price ceiling, which helps assure that the profit increase is in fact a result of efficiency gains. This plan as applied to LECs is scheduled for comprehensive review beginning just over a year from now. In this initial four-year period of operation, however, our intent has been to allow the plan to operate in a stable fashion, both to permit efficiencies to be realized and to enable us to draw valid conclusions about LEC performance under the plan over time. This goal is aided by the "backstop" mechanism that provides an additional safeguard against rates that are unreasonably high or low.

43.The record in this proceeding indicates that the price cap LECs as a whole are seeking the opportunity to raise price indexes industry-wide, on average, approximately 1.2 to 1.4 percent. This amounts to roughly a $233 to 267 million increase in interstate access rates that the IXCs and their customers would pay each year for at least the next 17 to 20 years. The LECs argue that these rate increases are justified as exogenous cost changes, at least in substantial part, basically because they are changes required by GAAP and Commission order, are out of the LECs control, and are not already reflected in GNP-PI. We address first the role of exogenous cost changes in price caps and the standards for determining whether a cost change should be considered endogenous (*i.e.*, included in the price cap formula) or exogenous (*i.e.*, added to the price cap formula).

44.This case presents the first opportunity for the Commission to consider and apply its approach to exogenous treatment under price caps to a particularly difficult situation. To summarize the case briefly, the claimed change in costs is the result of a change in accounting rules that applies generally to American businesses, not simply or uniquely to utilities and telephone companies. The effect of the change may therefore be reflected in GNP-PI. The LECs' claim is that, by analysis, they have reasonably identified the extent of the change's effect on GNP-PI, proven that it affects LECs disproportionately, and that a partial, fractional exogenous change has been justified, to the extent that the effect is greater for LECs than for the economy as a whole. The opposition assert that the LECs have failed to meet their burden of justifying exogenous treatment, on grounds including the LECs' ability to control OPEB costs, defects in the LECs' studies of SFAS-106's impact, and the fact that the change is only in the accounting for OPEBs, not in the economic costs of these benefits.

### B. Exogenous Cost Changes Under Price Caps

45.The category of exogenous cost changes was created by the Commission as an exception to the incentive structure of price caps. Based on a case-by-case evaluation of specific cost changes, the Commission adopted a list of these exceptional, exogenous cost changes in Section 61.45(d) of the Rules.[81]

46.In establishing this list and applying it in particular cases, we have considered and weighed several factors. Because the designation of any cost change as exogenous removes the incentive for efficiency that is a principle goal of price caps, a major consideration has been the extent to which the cost change may be affected by incentives. An efficiency incentive is effective only for costs which the carrier has some ability to control, for example by adjusting its operations or price structure. Changes in costs triggered by administrative, legislative, or judicial action beyond the control of the carrier have thus been considered as candidates for exogenous treatment, to ensure that the incentive structure of the price cap formula does not produce unreasonably high or low rates.

47. Certain types of cost changes were designated as exogenous in all cases, for example changes in the

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[79] Rochester Reply at 4-5.

[80] Since we decide that the LECs have failed to clear the threshold question raised in the investigation (that is, whether the LECs have borne their burden of demonstrating that implementation of SFAS-106 results in an exogenous cost change under the Commission's price cap rules), we do not address below all of the subsequent questions raised in our *Suspension and Investigation Order*.

[81] 47 C.F.C. § 61.45(d).

Separations Manual.[82] Other types of regulatory decisions accorded categorical exogenous treatment include pre-price cap programs such as the amortization of depreciation reserve deficiencies, changes in carrier support funds, and inside wire amortization.[83] However, not all changes in costs beyond the control of the carrier are likely to result in unreasonably high or low rates, or to otherwise be appropriate for exogenous adjustment. A change in tax law, for example, generally affects all businesses, not just carriers, and is thus likely to be reflected in the GNP-PI component of the formula. Exogenous treatment might thus double-count the change, unless the tax uniquely or disproportionately affects carriers.[84]

48. Moreover, the touchstone for the Commission in determining whether a change should be afforded exogenous treatment has been consistency with the incentive structure of the price cap plan. For example, in the *AT&T Price Cap Order* we stated that "[e]ven more important than the question of degree of control ... is the question whether exogenous cost treatment ... is consistent with the concept of incentive regulation."[85] The concept of incentive regulation is that an administratively simple mechanism of maximum prices, combined with a widened range of allowable profits, will provide encouragement for the carrier to make business decisions as a competitive firm would, in the knowledge that its earnings will in substantial part and over the long term be determined by how effective those decisions are. In deciding whether a cost change should be endogenous or exogenous, we have sought to maintain this incentive.

49. For example, in some cases where exogenous treatment was urged as necessary to prevent windfalls to the carrier, we have nevertheless required endogenous treatment to foster efficiency. For example, the Commission held that international accounting rate changes by foreign administrations are endogenous to encourage AT&T to negotiate lower rates with those administrations,[86] and bypass of LEC services by AT&T were also held endogenous to provide incentives for AT&T to minimize its costs and LECs to reduce access rates.[87] Similarly, carrier arguments that events outside the carrier's control should be considered exogenous have been denied where appropriate to maintain price cap's efficiency incentives. For instance, extraordinary costs caused by events such as earthquakes and hurricanes are endogenous. The Commission recognized that while the events were outside LEC control, preparing for and coping with such unforeseen costs is part of a firm's functions, and exogenous treatment would create the wrong incentives.[88] Moreover, migration of IXC POPs is endogenous and considered a common business risk for the LECs because exogenous treatment would be "contrary to the goals of the price cap program."[89]

50. In addition, we have taken into consideration the practical consequences of granting exogenous treatment of cost changes upon the goal of establishing an administratively simpler and less burdensome form of regulation.[90] For example, exogenous treatment of equal access conversion costs was denied, in part, because of the difficulty of reviewing those costs "and the corresponding risk that these carriers could willfully or inadvertently shift switched access costs into the equal access category ..."[91] A request for bifurcated treatment of depreciation rates, with exogenous treatment only of pre-price cap investments, was denied, not only because LEC's control their depreciation expenses and exogenous treatment would risk destroying LEC efficiency incentives, but also because the plan would be "an administrative nightmare."[92] The price cap formula establishes a "rough justice" measure of maximum reasonable rates, subject to adjustment through other mechanisms such as the "backstop", the comprehensive review, requests for waivers, and demonstration of good cause for permitting above-cap rates. In determining whether to treat a cost change as exogenous or endogenous, we have sought to recognize the operation of this framework, and to promote both the efficiency incentives of the price cap plan and the setting of just and reasonable rates.

51. We were initially inclined to treat accounting changes as categorically exogenous. This included GAAP changes, if the Commission found the changes in GAAP consistent with our regulatory accounting needs, and the change had become effective.[93] However, we later recognized that not all GAAP changes, even if approved by the Commission for accounting purposes, should be given exogenous treatment. For example, GAAP changes generally affect all companies, and exogenous treatment of such changes might, as in the analogous case of tax changes, double count the effect. We therefore decided to consider GAAP changes on a case-by-case basis. In the specific case of OPEBs, we also denied requests for removing pre-funded amounts from price caps and, taking into account "the orderly administration of the price cap system", deferred consideration of whether to allow exogenous treatment of OPEBs until the GAAP change became effective.[94] We reiterated that "the determination of whether a particular GAAP change is exogenous includes an analysis of whether the cost change will be reflected in the inflation variable of the PCI."[95]

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[82] *See* 47 C.F.R. § 61.45(d)(1)(iii); *LEC Price Cap Order*, 5 FCC Rcd at 6807 ("Regulatory decisions that are designed to produce just and reasonable rates must affect the cap in order to ensure that the system results in rates that are just and reasonable.")

[83] 47 C.F.R. § 61.45(d)(1)(i), (iv), and (viii).

[84] *Id.* at § 61.45(d)(1)(vi); *see also AT&T Price Cap Order*, 4 FCC Rcd at 3009.

[85] *AT&T Price Cap Order*, 4 FCC Rcd at 3016 (finding depreciation rate changes are endogenous, even though prescribed by the Commission).

[86] *Id.* at 3018.

[87] *Id.* at 3020-21.

[88] *LEC Price Cap Order*, 5 FCC Rcd at 6809-10.

[89] *Id.* at 6809.

[90] *AT&T Price Cap Order*, 5 FCC Rcd at 3020 (exogenous treatment of extraordinary costs "would be setting the stage for an endless succession of arguments focused on whether a particular cost qualifies as extraordinary.'").

[91] *LEC Price Cap Order*, 5 FCC Rcd at 6808.

[92] *Id.* at 6809.

[93] *AT&T Price Cap Order*, 4 FCC Rcd at 3017-18; *LEC Price Cap Order*, 5 FCC Rcd at 6807.

[94] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2663-65.

[95] *Id.*

52. The test for whether GAAP changes should be treated as exogenous has two prongs. First, are the costs not within the control of the price cap carriers? And second, are the costs not reflected in the price cap formula, for example, in GNP-PI? If the answer to both questions is yes, GAAP changes can be treated as exogenous. We also made it clear that price cap carriers seeking adjustment to their PCIs based on a change in GAAP bear the burden of demonstrating that exogenous treatment should be granted.[96] More generally, in any Section 204(a) rate investigation, carriers bear the burden of proof to show that a rate increase is just and reasonable.[97]

### C. Exogenous Treatment of SFAS-106

#### i. LEC Control Over OPEB Expenses

#### a. Ongoing OPEB Expenses

53. No party disputes that the change to accrual accounting by FASB was not within the carriers' control, but they differ in the extent to which carriers can control the effects of this change.[98] Some of the parties have argued that the control prong of the test for exogenous treatment is resolved in the LECs' favor once the Commission has decided that a GAAP change is consistent with the Commission's accounting purposes. They note that the particular sections in the price cap decisions on GAAP changes are silent on control except to recognize that GAAP changes must be consistent with FCC regulatory policy before carriers may adopt them. We believe that these parties put forth an overly narrow view of the meaning of control for purposes of evaluating whether a particular cost change warrants exogenous treatment under our price cap plan. In general, we have held that a lack of control over the regulatory action is not enough of a showing to justify exogenous treatment. For example, in our decision to deny exogenous treatment of depreciation rates,[99] the Commission noted that while the change in depreciation rates was set by federal and state regulatory agencies and was thus beyond the control of the carriers, the carriers nonetheless could exercise control over depreciation costs through their decisions to deploy or retire equipment, the major determinant of the amount of depreciation expenses. As in that decision, we find that the LECs have had, and continue to have, control over the present and future benefit plans they set with their employees and the costs of these plans, the major determinants of OPEB expenses. Just as they do for depreciation expense, LECs can exercise substantial control over the level and timing of OPEB expenses. Treating a change in OPEB accounting as exogenous would, at least for ongoing benefit plans, give the LECs undue power to influence their PCI levels, and would undermine the incentive structure of price caps.

54. As with other forms of compensation, the LECs exercise considerable control over the costs of administering their retiree health care plans. Indeed, the scope for efficiency gains is probably greater for those benefits than for other forms of compensation. For example, to reduce costs of OPEBs, and thereby reduce booked liabilities, companies can explore managed care arrangements, flexible benefit plans, outpatient treatment programs and generic prescription drug programs.[100] Companies can also seek to encourage efficient use of health resources through co-payments, for example, benefit caps and shared expense requirements.[101] The LEC direct cases reveal that companies have begun introducing, or plan to introduce, these types of cost control measures without changing the underlying benefits that are provided.[102] Indeed, NYNEX explains that a benefit cap alone would cut its estimated OPEB accruals under SFAS-106 nearly in half.[103]

55. Moreover, the LECs, like all companies, have considerable control over their underlying benefit plans, especially in relation to their overall compensation packages. When originally negotiating with employees for OPEBs, the LECs are apparently in a position neither more favorable nor less favorable than other firms, either regulated or nonregulated, when competing in the market for hiring labor. In other words, there is no evidence that the LECs need to pay more, or less, than the total wages and benefits set by the market to attract the workers they need. Exogenous treatment of ongoing OPEB costs would be asymmetric, treating compensation in the form of OPEBs differently from compensation in the form of wages and other benefits. This asymmetry could distort LEC incentives, undercutting the efficiency incentives price caps was intended to create. For example, the LECs could substitute wages for OPEB benefits.[104]

56. SFAS-106 may have an effect of highlighting OPEB costs and moving forward the time when they are recognized, but it does not change the total amount that all firms, including the LECs, must pay to attract workers. It also does not change the LECs ability to design overall compensation and benefit packages that attract and keep good employees, as cost-efficiently as possible. Therefore, we find that at least as to future accrued OPEB expenses, the LECs have substantial control over the amount booked as OPEBs, and thus fail the first prong of the exogenous cost test.

#### b. TBO Expenses

57. While we thus conclude that going-forward OPEB costs are within the control of the LECs, and thus not eligible for exogenous treatment, it is less clear whether or to what extent the LECs control OPEB costs associated with the TBO for purpose of the test for exogenous treatment. US West, for example, agrees that it exercises

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[96] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2663-65, 2668.

[97] 47 U.S.C. § 204(a).

[98] *Compare* MCI Opposition at 7-10 *with, e.g.*, Ameritech Reply at 10-11; Bell Atlantic Reply at 8; GTE Reply at 20-23.

[99] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2671-72.

[100] *See e.g.*, Washington Post, Aug. 18, 1992, p. C1; Business Week, Nov. 30, 1992, p. 114-15.

[101] New York Times, Nov. 24, 1992, p. D2.

[102] *See e.g.*, Ameritech Direct Case at 21; Bell Atlantic Direct Case at 26; Pacific Reply at 18.

[103] NYNEX Direct Case, Attachment B. *See also* BellSouth Reply at 29 (cap to be placed beginning January 1, 1993); SNET Direct Case at 27 (cap will be in effect in 1996); US West Direct Case, Attachment F (20% cap).

[104] *See* MCI Opposition at 9.

control over ongoing benefit costs for OPEBs, but contends it has no control over TBO costs, which represent the accrued amount of benefits promised to retirees before SFAS-106 took effect. US West argues for recognition of at least the TBO as an exogenous cost.[105] Even though the LECs can implement cost cutting measures that would not necessarily require changes to the underlying benefit plans, and these companies controlled these plans when they were originally negotiated, it appears that the LECs may well have less control over some of the amounts included in the TBO because these obligations are based on past contractual obligations, obligations that arose prior to the mandated GAAP change.[106]

58. First, the TBO includes benefits accrued by both those vested in their benefit plans and those not yet vested. Since US West admits that, on a prospective basis, it controls OPEB costs of those who are not yet vested, its argument that the entire TBO should be exogenous appears overbroad. Moreover, it is not clear to what extent either the benefit plans or their costs are fixed even for vested employees. As discussed above, the LECs and other companies are exploring changes in their plans even for current retirees. The extent to which they can control changes in these plans apparently depends upon the specific terms of their labor contracts. Moreover, the level of benefits provided to retirees is not necessarily linked to the cost of the plan. An improvement in efficiency, such as preventative measures to improve retirees' health, or more cost-effective therapy, may reduce costs without reducing benefits.

59. For the present, however, we need not resolve the issue of whether the LECs meet the first prong of the test for exogenous cost treatment. As we discuss below, even assuming lack of control over the TBO, we conclude that the LECs have failed to meet their burden of proving that the TBO meets the second prong of the test.

**ii. Unique or Disproportionate Effect**

60. The second prong of the test for exogenous treatment of these costs is whether the carriers can show that the cost change at issue is not reflected in the PCI. To satisfy this test, the carriers must show that the cost change has a unique or disproportionate effect on the price cap companies.[107] We have emphasized, for example, that LECs bear the burden of demonstrating that a cost change is not already reflected in the economy-wide GNP-PI component of price caps. For example, where there is a tax law change that affects all companies in the economy, the change is endogenous even though the LECs may be affected to a greater or lesser degree than the average taxpayer.[108] Our review of the current record convinces us that the LECs have not met their burden. The studies provided are flawed in several significant respects and it is impossible for this Commission to determine whether or to what extent OPEBs have been reflected in GNP-PI on the basis of the record.

**a. GNP-PI Studies and SFAS-106 Accounting**

61. We note, as an initial matter, that the GNP-PI component of the formula is affected by a myriad of influences, each of which affects a company or the industry in differing degrees. Every cost change that affects LECs will be reflected to a greater or lesser degree in the economy as a whole, and thus to a greater or lesser degree in GNP-PI. Thus, there is not necessarily a precise correspondence between any particular endogenous cost change and the extent to which it is reflected in GNP-PI. In determining whether a particular cost change is reflected in GNP-PI for purposes of determining whether it satisfies the second prong of the test for exogenous treatment, we must keep in mind the "rough justice" nature of the GNP-PI element of the price cap formula.

62. The present case illustrates the difficulty of evaluating whether a change in one of these influences can even be identified and reasonably quantified. First, the assumptions on which such an analysis might be made are unclear, as the two LEC studies show. Godwins assumes that SFAS-106 is an economic cost change that will affect all companies' costs and prices in the "coming years, and contends that the effect on LECs is disproportionate because they typically differ from other companies in characteristics such as the level of current OPEB benefits and, the demographics of their employees and retirees. Godwins also reasons that SFAS-106 will tend to lower other wage rates. In sharp contrast, NERA argues that SFAS-106 will have none of these effects for most companies, because it does not change their actual economic costs and liabilities. While Godwins assumes that companies respond to their booked costs, NERA reasons that non-regulated companies set prices based on economic costs, which are better reflected in accrual accounting than pay-as-you-go. According to NERA, non-regulated firms thus have already reflected accrued OPEB costs in their prices, but regulated firms did not, because their prices have been based upon accounted-for costs plus profit. The disproportionate impact for the LECs, according to NERA, stems from this constraint on regulated firms such as the LECs.

63. Neither study proves that its initial assumptions are in fact correct and any conclusion we might draw from them thus seems speculative. We are given no substantial evidence to indicate that companies either have in the past factored accrued OPEB costs into their prices, as NERA assumes, or that they are beginning to do so now that SFAS-106 has taken effect, as Godwins assumes. The evidence at hand is that many companies have taken one-time write-offs and have undertaken efforts to reduce their long-term OPEB costs. But this applies to the LECs as well as others. Thus, as a starting point, we have no clear basis for determining what effect SFAS-106 will have on GNP-PI.

64. Moreover, we do not believe that, even on their own terms, the LEC studies persuasively demonstrate that the SFAS-106 has a "unique or disproportionate effect" on LECs within the meaning of the test for exogenous

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[105] US West Reply at 9.

[106] It is also possible that LECs relied on the initial price cap orders, which indicated that all mandatory GAAP changes would be considered exogenous, when making business decisions on whether to fund OPEBs. The Commission modified this approach on reconsideration. *See* para. 49, *supra*.

[107] *See* Section IV A, *supra*.

[108] *Compare AT&T Price Cap Order*, 4 FCC Rcd at 3009 and *LEC Price Cap Recon Order*, 6 FCC Rcd at 2668 *with Bell Atlantic Trans. 473*, 7 FCC Rcd 1486 (Com. Car. Bur. 1992).

treatment. We are particularly concerned that the Godwins and NERA studies rely on assumptions that affect the results and that we have no independent means to verify. For example, we note that the Godwins model assumes the values for several parameters in its model, and estimates several others. In its Supplemental Report attached to several of the LECs' Reply comments, however, Godwins notes that there are 648 possible combinations of the range of values of the parameters whose values were assumed in the model.[109] Godwins reports that proportion of SFAS-106 costs which would not be reflected in the GNP-PI for several, although not all 648, of these combinations. It finds that, using what it terms "unlikely and extreme" values of the parameters, the lowest portion of SFAS-106 costs that will not be reflected in the GNP-PI is 60.1 percent as compared to the 84.8 percent it stated in its original study. Additionally, we are not persuaded by the basic assumption in the NERA Study that the unregulated sector has already fully assessed the effect of the SFAS-106 accounting change. Evidence in the record suggests that many firms in the unregulated sector did not even measure their OPEB liabilities until late in 1992, much less determine how it will affect them as a result.[110]

65. We are additionally concerned that SFAS-106 accounting requires LECs to make many other assumptions which are highly speculative and where small changes to certain key assumptions in their calculations would dramatically alter the computed effect of SFAS-106 and the resulting exogenous claim. As is the case with the assumptions underlying the studies, we have no way to verify most of the assumptions made by the LECs in their claims. For instance, the central subject in this investigation centers on predictions of future health care costs. In view of the current national debate on these issues, such predictions must be viewed as very speculative. As AT&T notes in its opposition, SFAS-106 accrual amounts are very sensitive to changes in the health care trend. AT&T notes, for example, that a one percentage point reduction in the health care trend from the value assumed by Pac Bell would reduce the accrual amount by 15.3 percent, and a 4 percentage point reduction in the health care trend would reduce the accrual amount by 55 percent from what Pac Bell seeks in its direct case.[111] Were we to grant exogenous treatment based on these speculative and highly sensitive assumptions, the LECs would only have to beat those assumptions to realize an apparent productivity gain.[112]

66. In sum, given the flaws in the NERA and the Godwins studies, we cannot accept the LECs' conclusion that the majority of the costs associated with the TBO are not reflected in the GNP-PI. We have no means of accurately calculating the extent of the impact on the basis of the record. Rather, we are dependent on the LECs. They bear the burden of providing the Commission with accurate data. When such data are not forthcoming it is impossible for us to conclude with reasonable certainty whether and the extent to which the costs associated with the TBO are not reflected in the GNP-PI. Indeed, it would be arbitrary for the Commission to select a number based on the record before us.

**b. Intertemporal Double-Counting**

67. In addition to the reflection of OPEB costs in GNP-PI itself, this case presents a source of double-counting which we have not contemplatedbefore. This source arises from the intertemporal nature of this change. Because pay-as-you-go amounts for OPEBs are already built into the LECs' rates, the "GNP-PI - X" factor in the PCIs would give the LECs all the funds they need over time to cover these expenses. Exogenous treatment of the movement forward of the recognition of expenses required by SFAS-106 thus introduces a second source of possible double-counting: the immediate recovery of these costs (on an accrual basis) as an exogenous change, and the recovery over time of these costs in the GNP-PI - X adjustments to the PCIs.

68. The LECs have attempted to remove this second source of double-counting by claiming as an exogenous adjustment only the difference between current pay-as-you-go amounts and their current estimate of the accrual amount. However, for this difference to accurately remove this form of double-counting, the assumed values of the medical trend growth rate, discount rate, retirement rates, and all the other demographic assumptions used to determine the accrual amount must exactly match what will occur, and must not change over time. If the assumptions are incorrect or change over time, companies will have an apparent productivity gain (or loss) by beating (or not beating) the assumptions, rather than by becoming more efficient (or less efficient) than they were in the past. Thus, the accuracy of the assumptions is critical to prevent a shift of the risk/reward balance between carriers and ratepayers which was set up in price caps.

69. While it may be possible to make an informed estimate of what these assumed values currently are, it is not clear that we can determine what they should be in an economic sense. The removal of the intertemporal double-counting depends on the assumptions used being correct. We are not persuaded that we should make these estimates to protect the LECs from what we view as a normal business risk, of the sort that price caps places on the LECs. Additionally, a year-by-year true-up mechanism that would be necessary to deal with this double counting issue would be a complex addition to the price cap plan,

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[109] *See* United States Telephone Association, "Analysis of Impact of SFAS 106 Costs on GNP-PI, Supplemental Report: Responses to Objections Raised Regarding Original Study," at 31.

[110] Towers Perrin Monitor, "FAS 106: Preparing to Take the Hit," April 1992, Towers Perrin Survey, "Facing FAS 106: Where Employers Stand," 1, 3-5.

[111] AT&T Opposition at 22-23. We are also concerned that the assumptions that are developed from these data, such as the medical trend rate we discuss here, can easily be manipulated and that even a small percentage difference in the assumption derived from the data can significantly affect SFAS-106 expense.

[112] MCI Opposition at 10. Finally, some parties suggest that simply because there may be uncertainty and some double counting, these are not sufficient reasons to deny the entire exogenous amounts requested. Instead these parties suggest that the Commission reduce these amounts to the extent it believes such reductions are reasonable. The price cap rules, as well as Section 204 of the Communications Act, squarely place the burden on the carrier to demonstrate that the change at issue has a unique or disproportionate impact on the LECs. The LECs have not met that burden here.

especially since the price cap mechanism, without any exogenous adjustment, will permit LECs to recover all OPEB expenses over time.[113]

**c. Other Double-Counting**

70. It also appears very possible that the effect is double-counted in other components of the price cap formula. One instance is the rate of return used to establish reasonable initial rates to begin price caps. SFAS-106 does not change actual OPEB liabilities, but only the time at which they are recorded in company accounts, so as to better inform investors of the extent of the company's liabilities. How investors evaluated these liabilities for LECs and other companies before and after the adoption of SFAS-106 is unclear, especially since many companies have not yet calculated or reported the results. To the extent that investors based their assessments of risks and earnings on the accounts as filed, it remains uncertain how the risks to LECs were assessed.

71. For instance, if investors knew that the LECs would be unable to raise their rates upon implementation of SFAS-106, then the investors might require a higher return. Conversely, if investors knew that the LECs would be able to raise their rates upon implementation of SFAS-106, then the investors might accept a lower return. Investors, of course, did not know whether the LECs would be allowed to raise their rates upon implementation of the accounting change.[114] Thus, what investors believed about the effect on rates of this change determined what return they required on their investment in the LECs. There must have been at least some doubt about whether the LECs would be able to change their rates when SFAS-106 was implemented, and thus a relatively higher return would have been required. If so, the change to SFAS-106 would already be reflected in the initial rate of return. However, no party in this investigation has introduced evidence on what investors' expectations were and, indeed, it may not be possible to quantify this factor with any accuracy.

72. Finally, although not raised by the parties, we find that another unresolved double counting issue centers on the extent to which SFAS-106-type costs are included in the studies of cost changes used to determine the productivity factor in the price cap formula. The short run productivity study in Appendix C of the *LEC Price Cap Order* [115] examined changes in LEC costs from 1984 through 1990, adjusted for several exogenous cost factors. During this period, several LECs were introducing VEBA trusts.[116] These trusts were a method of prefunding the OPEB obligation for certain bargaining unit employees. No adjustment was made in the short run productivity study for these VEBA costs. The long run study of productivity, in Appendix D of the *LEC Price Cap Order,* which examined data from 1930 to 1989, also made no adjustment for these VEBA trusts. Thus, the productivity studies on which the Commission relied to set the productivity factor in the PCI formula already reflected some SFAS-106-type costs. There are thus two possible questions about double counting which must be considered, but that the LECs failed to address: (1) what would have been the effect on the productivity studies of excluding these costs, and; (2) how would the Commission have weighed this change in the results of the studies in setting the productivity factor.[117]

**D. Reasonable Rates and the Operation of the Price Cap Plan**

73. Our denial of exogenous treatment of SFAS-106 on the current record may be viewed by the LECs as unnecessarily strict. In our view, however, the result is not unfair to the LECs or to customers, and is consistent with the price cap plan. As we discussed above, the price cap plan was intended to create incentives similar to competitive markets by relatively simple administrative mechanisms. One of the major reasons for limiting exogenous factors was precisely to retain incentives and to minimize complexity. The list was also developed as part of the overall proceeding, subject to extensive public review and comment, where all potential exogenous changes could be considered, not simply those the LECs might choose to

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[113] In view of our conclusion that the current record does not support exogenous treatment of SFAS-106 costs, we do not address AT&T's alternative proposal to limit such treatment of amounts actually funded and to specify the parameters of allowed accruals.

[114] In the *LEC Price Cap Order* we stated generally that no carrier could treat GAAP changes as exogenous until we approved the change. *LEC Price Cap Order,* 5 FCC Rcd at 6807. More specifically, the Commission deferred consideration of exogenous treatment of SFAS-106 until FASB had approved the change in GAAP, and the change became effective. *LEC Price Cap Reconsideration Order,* 6 FCC Rcd at 2663.

[115] 5 FCC Rcd at 6885-6928.

[116] VEBA Trusts are tax effective funding vehicles that generally forbid removal or transfer of funds except for the purpose for which they were established. 26 U.S.C. § 501(c)(a). Some LECs argue that it is unfair that some carriers were permitted to reflect in their rates OPEB accrual amounts funded in these VEBA trusts prior to implementation of the price cap system, but that other carriers would not be permitted to reflect these amounts if we reject their request for exogenous cost treatment. We note, however, that the *LEC Price Cap Reconsideration Order* made clear that we would not remove already-accrued OPEB expenses from initial price cap rates because to do so would redefine what is accepted as reasonable and prudent under prior, rate of return standards. *LEC Price Cap Reconsideration Order,* 6 FCC Rcd at para. 62. These amounts should not be treated as unreasonable or imprudent, we continued, merely because our regulations have changed. *Id.* As we stated previously, the initial PCIs of the LECs were set at existing rate of return levels as a reasonable, "rough justice," starting point for price cap regulation.

We also made clear at that time, contrary to the allegations raised by some of the parties in this proceeding, that we would not prejudge the issue of whether OPEB expenses should be afforded exogenous cost treatment. We did not conclude that exogenous cost treatment of OPEB expenses would necessarily follow from an effective FASB decision. Rather, we stated that "carriers that elected to wait until the GAAP change becomes effective before expending funds for OPEB are not *necessarily* foreclosed from recovering those costs." *Id.* (emphasis added).

[117] Exclusion of these costs from the short run study would have resulted in a greater reduction in LEC costs in the period studied. The greater reduction in LEC costs would have implied a larger productivity factor in the short run study. If this were the case, the Commission might well have chosen a higher productivity factor for the price cap formula.

propose. Our approach to the overall design of the price cap plan struck a careful balance between the interests of carriers and ratepayers. If we were not to follow a strict approach to requirements for exogenous treatment, ratepayers would be at risk because the LECs would have incentives to make a case for exogenous treatment only when it raises the PCI, and not when such treatment would lower the PCI.

74. In addition, the implementation of SFAS-106 does not change the size or nature of the OPEB payments of LECs or other firms to their present or future retirees. These are matters of the firms' business decisions or their negotiations with employees and unions. As MCI points out, LECs are not required to change these payments in any way, but only to change the timing of the recognition of those costs on their books, to the extent that the LEC has not pre-funded its OPEB commitments. This accounting change should be useful to investors and management in evaluating company balance sheets. It may also prompt a reevaluation of OPEB benefits packages, based upon the clearer recognition of OPEB liabilities. But it does not change the actual flow of benefits payments the companies make over time. The LECs' actual OPEB payments will continue to be based on the terms of their benefit plans for current and future retirees, and the claims submitted by retirees under those plans. The price cap mechanism, since it is based on rates and costs as of 1990, already provides for recovery of these actual OPEB payments. It is thus the case that this GAAP change does not create an economic cost change for companies in general or for the LECs in particular, as the NERA Study also contends.

**E. Conclusion**

75. We believe our decision to deny exogenous treatment of the SFAS-106 accounting change at this time is fully consistent with the price cap plan system of regulation implemented in 1990. Price caps was designed by this Commission to create a simplified approach to setting fair rates with strong efficiency incentives. In a system where few costs can be passed through to rates, carriers are forced to manage their business operations, including personnel administration, to maximize efficiency. To avoid blunting of efficiency incentives, the price cap rules thus permit only a few types of costs to be treated as exogenous cost factors. Under the test we have established for costs such as those associated with GAAP changes, ongoing costs of LEC decisions regarding employee benefit programs are within the control of the LEC, as well as being reflected in GNP-PI, and thus do not qualify. The control issue may be less clear for the TBO amounts, but the LECs in the current investigation have in any event not met their burden of demonstrating that these costs will have a unique or disproportionate effect upon them.

76. Our decision in this case is not intended to foreclose further consideration of exogenous treatment of TBO amounts, based on a better and more complete record, for example in the annual 1993 access tariff filings. In addition, the issues identified in this proceeding concerning the role of exogenous costs in price caps may also be raised in the comprehensive review of price caps, scheduled to begin before the end of this year and to be completed by the end of the fourth year of the plan in 1994. In the mean time, the low-end adjustment mechanism provides substantial protection against prolonged unreasonably low earnings.

**V. ORDERING CLAUSES**

77. Accordingly, IT IS FOUND pursuant to Sections 4(i), 4(j), 201(b), 203, 204(a)(1), 403, and 404 of the Communications Act that the tariff rates in Bell Atlantic Tariff F.C.C. No. 1, Transmittal Nos. 497 and 536, US West Communications, Inc. Tariff F.C.C. Nos. 1 and 4, Transmittal No. 246, and Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1579 ARE UNJUSTIFIED AND UNLAWFUL.

78. IT IS FURTHER ORDERED that Bell Atlantic, US West Communications, Inc. and Pacific Bell SHALL FILE tariff revisions removing the unlawful material and reinstating lawful tariff material no later than seven days after the release of this Order to become effective on not less than one day's notice. For this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED, and Special Permission No. 93-85 IS ASSIGNED.

79. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies, US West Communications, Inc., and Pacific Bell SHALL REFUND, WITH INTEREST, all new or increased charges collected as a result of the afore-mentioned transmittals to the persons in whose behalf such amounts were paid, no later than thirty days following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 86-10**

In the Matter of

Provision of Access for
800 Service

**MEMORANDUM OPINION AND ORDER ON FURTHER RECONSIDERATION**

**Adopted: January 29, 1993; Released: January 29, 1993**

By the Commission:

## I. INTRODUCTION

1. This Memorandum Opinion and Order on Further Reconsideration clarifies and modifies the Memorandum Opinion and Order on Reconsideration[1] (the "Reconsideration Order") addressing the obligations of local exchange carriers (LECs) in furnishing 800 access service to interexchange carriers (IXCs). Specifically, we clarify that independent telephone companies (ITCs) may provide 800 data base access without meeting the five-second access time standard established for the Bell Operating Companies (BOCs) and GTE, and we require them to convert from NXX to data base access at the same time as other LECs. In addition, we clarify the Reconsideration Order in certain other respects. We otherwise deny the petitions for reconsideration.

## II. BACKGROUND

2. 800 service is an interexchange service in which subscribers agree in advance to pay for all calls made to them using a predesignated 800 number. Currently, LECs provide originating 800 access service through an "NXX" screening that allows LECs to identify particular interexchange carriers by reading three digits -- the "NXX" digits -- that immediately follow the 800 prefix of the dialed number. Because the NXX system identifies the 800 carrier by the NXX digits, it requires that each NXX be assigned to a particular interexchange carrier. As a result, under the NXX system, 800 subscribers cannot change carriers without changing their 800 number.

3. The NXX access system will be replaced with a new "data base" system of 800 access. LECs will implement this data base system by linking their common channel signaling system (SS7) networks with data bases containing service information associated with each 800 number, including the carriers selected by the 800 subscriber with that number. Because the data base system permits LECs to use the entire 800 number, rather than just the NXX digits, to identify the 800 carrier, this system permits 800 "number portability" -- *i.e.*, it allows an 800 subscriber to use any carrier (or more than one carrier) with any 800 number, and to change carriers without changing its 800 number.

4. On March 30, 1989, the Commission ruled that LECs may replace the NXX access system with the new data base system when they were able to achieve certain access times with a data base system.[2] The Reconsideration Order revised this access time standard and required the BOCs and GTE to meet the revised standard by March 4, 1993. Under the revised standard, the Commission required the BOCs and GTE to reduce access times for 97% of their originating 800 data base access traffic to five seconds or less by March, 1993.[3] In addition, noting data indicating that the vast majority of ITCs would voluntarily provide data base access, the Commission declined to order ITCs to provide it.[4] The Commission stated, however, that it would revisit this issue if necessary. The Reconsideration Order also rejected requests to: (1) retain a limited NXX option[5] once number portability is implemented;[6] (2) require IXCs to offer subscriber-requested vertical features available from a LEC;[7] and (3) change existing accounting or separations rules to accommodate the introduction of SS7 technology into the public switched network.[8]

5. Six parties filed petitions for reconsideration or clarification of the Reconsideration Order. In response to these petitions, thirteen parties filed comments on November 14, 1991 and eight parties filed replies on January 3, 1992.[9]

## III. OBLIGATIONS OF ITCs

### A. Petitions for Reconsideration

6. NTCA and OPASTCO ask us to clarify how access

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[1] Provision of Access for 800 Service, 6 FCC Rcd 5241 (1991).

[2] Provision of Access for 800 Service, 4 FCC Rcd 2824 (1989). "Access time" is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating LEC to an IXC. For additional background information, *see* Supplemental Notice of Proposed Rulemaking, 3 FCC Rcd 721 (1987); and Notice of Proposed Rulemaking, 102 FCC 2d 1387 (1986).

[3] The Commission further required the BOCs and GTE, within two years after the current NXX access system is replaced with data base access, to ensure that: (1) none of their data base 800 traffic experiences an access time of greater than five seconds, and (2) the mean access time for all of their 800 data base traffic is 2.5 seconds or less. *See* 6 FCC Rcd at 5425, para. 19. The Common Carrier Bureau recently granted limited waiver of the Reconsideration Order's March 1993 access time standard to each of the BOCs and GTE. *See* Provision of Access for 800 Service, CC Docket No. 86-10, Orders, (released July 28, 1992).

[4] *See* 6 FCC Rcd at 5426, para. 26.

[5] Under this limited NXX option, a limited number of currently unassigned NXXs would be made available to IXCs so that they could accommodate users that preferred NXX access to data base access.

[6] *See* 6 FCC Rcd at 5425-5426, paras. 22-23.

[7] *See id.* at 5428, para. 36 n.56.

[8] *See id.* at 5429, para. 40.

[9] A list of parties filing petitions for reconsideration, comments and replies is listed in Appendix A. We use the abbreviations listed in that appendix throughout this Order.

time standards will apply to ITCs.[10] They ask that the standards not be applied in a manner that imposes unrealistic and unwarranted compliance burdens on small LECs. They argue that small LECs have fewer financial resources than larger LECs and also deploy a wide variety of network architectures that limit the access times that they can achieve. They also note that many small ITCs, particularly those that currently route their 800 traffic through more than one access tandem, do not achieve access times of five-seconds, even for their NXX traffic.

7. NTCA asserts that a literal interpretation of the Reconsideration Order would require that all LECs meet the access time standard prescribed for the BOCs and GTE. This, it claims, cannot be reconciled with the Commission's commitment to permit small LECs to plan implementation in a flexible manner that best serves their needs.[11] It requests that the Commission clarify that the access time standards do not apply to small LECs that either route 800 traffic to a connecting LEC, instead of deploying their own SS7 functionality, or deploy SSP functionality on a subtending network basis.[12]

8. OPASTCO proposes that the access times of small LECs be averaged with those of the large LECs in the same area for purposes of FCC access time standards.[13] It notes that larger LECs are already allowed to average the access times of their rural exchanges with their larger urban and suburban exchanges. It states that since small LECs generally serve rural areas only, it would be unfair to hold them to the same overall access time standards as LECs that serve rural, suburban, and urban areas. OPASTCO also asks that ITCs be permitted to meet access time standards in a time frame beyond two years. It claims that there are variables outside the control of its members that may affect their ability to comply with the standards.

**B. Positions of the Parties**

9. Ad Hoc opposes the petitions of OPASTCO and NTCA. It claims that the Commission has insufficient information to address their concerns, and it urges the Commission to ensure that the BOCs and GTE make adequate provision in their Implementation Plan for ITC participation in 800 data base service.[14]

10. BellSouth, MCI, NYNEX, Sprint, USTA, and US West generally support OPASTCO's and NTCA's request for clarification.[15] Emphasizing the importance of ITC participation to the creation of a nationwide 800 data base system, BellSouth, NYNEX, USTA, and Sprint claim that a slightly higher access time for smaller ITCs, for whom compliance with the BOC/GTE standards might impose an excessive financial burden, would be acceptable if such an access time standard would ensure their participation in the 800 data base plan.[16] They also note that a higher access time standard for those LECs would have little overall impact on the quality of 800 service since these LECs collectively carry a small percentage of the nation's 800 traffic. Similarly, MCI recommends that the Commission exempt small, Tier III LECs from the Commission's access time standards to ensure that these LECs provide 800 data base access.[17] Nevertheless, it recommends, along with Metromedia, that the Commission order all ITCs to provide 800 data base access.[18] Claiming that data base access must be ubiquitously provided, both MCI and Metromedia express concern that some ITCs may not voluntarily provide 800 data base access unless required to do so. US West takes the position that there is nothing in the Reconsideration Order that suggests that the Commission intended to apply its access time standards to non-GTE/BOC companies since to do so would unfairly burden them.[19]

11. Despite their support for a flexible access time standard to accommodate the special needs of smaller ITCs, a number of BOCs emphatically oppose any kind of proposal to average ITC call times with those of the BOCs and GTE -- particularly if, as a result of such averaging, the BOCs and GTE would be held accountable for failure to comply with the Commission's access time standards.[20] For example, SWBT contends that if it were required to include call setup times encountered with the ITC networks into its own access time figures, it would be unable to meet the standard set for the year 1995.[21]

12. USTA asserts that even without the Commission's access time standards, there is no reason to anticipate that ITCs as a group would present any significant access time problem for 800 data base service.[22] USTA bases this assertion on a survey it recently conducted among non-GTE ITCs which found that access times of 75% of the 800 data base traffic of these carriers as a group will be under 5 seconds, with 92% under 5.5 seconds.[23]

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[10] NTCA Petition for Clarification and/or Reconsideration filed November 14, 1992; OPASTCO Petition for Clarification and/or Reconsideration filed November 14, 1992.

[11] NTCA Petition at 4-5; *see also* OPASTCO Petition at 6.

[12] NTCA Petition at 10. In a "subtending network" arrangement, a LEC would deploy SSP functionality and connect to another LEC's SCP.

[13] OPASTCO Petition at 5.

[14] Ad Hoc Comments at 2. Ad Hoc filed its in comments before the Implementation Plans of the BOCs and GTE were submitted.

[15] BellSouth Comments at 1-2; MCI Comments 2-5; NYNEX Comments at 2-5; Sprint Comments at 8-9; Sprint Reply at 5; USTA Comments at 3-4; US West Comments at 1-3.

[16] *See e.g.*, BellSouth Comments at 1-2; NYNEX Comments at 2-5; Sprint Comments at 8-9; Sprint Reply at 5. *See also*, AT&T Comments on the BOC and GTE Implementation Plan at 48; Ad Hoc Comments on Plan at 14-17; Sprint Comments on Plan at 15-16; Sprint Reply Comments on Plan at 8-9 (arguing that the Commission should make every effort to ensure ubiquitous 800 data base access).

[17] MCI Reply at 1-3.

[18] MCI Comments on the BOC and GTE Implementation Plan at 16; Metromedia Comments on the Plan at 1-7. *But see* Sprint Reply on the Plan at 7-8; OPASTCO Reply on the Plan at 3-4.

[19] US West Comments at 2.

[20] *See e.g.*, NYNEX Comments at 4-5; SWBT Comments at 6; Pacific Reply at 1-2.

[21] SWBT Comments 5-6.

[22] Letter from Martin T. McCue, General Counsel, USTA, to Donna R. Searcy, Secretary, FCC, July 7, 1992. USTA states that a typical condition that would cause longer access times would result where deployment of SS7 capability has not yet been fully accomplished.

[23] *Id.* USTA's survey covers a cross-section of ITCs --i ncluding small, medium, and large ITCs -- that together account for over 11 million access lines. USTA maintains that

**C. Discussion**

13. We now clarify that the five-second access time standard does not apply to the ITCs other than GTE. We further hold that all ITCs are required to provide 800 data base access at the same time as other LECs.

14. Throughout this proceeding, we have recognized the special needs of small ITCs in providing 800 data base access. For example, we have made it clear that small ITCs may provide data base access in a variety of ways, and that we seek to afford these IXCs maximum flexibility in planning their participation in a manner that best serves their needs and financial capabilities. To apply the five-second standard to these ITCs would be inconsistent with this commitment.

15. Underlying our decision to provide ITCs with flexibility in planning their participation in the 800 data base system is our recognition not only of the different economic constraints that affect small and large LECs, but also that ITCs employ a wide variety of switches and network architectures that directly affect the access times they can achieve under both NXX and data base access. In many cases, small ITCs could not meet a five-second access time standard for data base access without substantial and costly network changes. For many, such changes would be imprudent in light of their limited resources or their limited 800 traffic volume. For others, the necessary changes could not possibly be completed before the March 1993 cutover to data base access. We decline to impose such an unfair and arbitrary requirement on small ITCs.

16. Indeed, to hold small ITCs to a five-second access time standard would be, in effect, to hold them to a standard that is stricter than that imposed on larger LECs. First, the largest LECs have all received waivers of the five-second access time standard, so the five second standard no longer applies even to them, at least until 1995. Second, many ITCs do not meet the five second standard today for their NXX traffic. Thus, to hold them to a five-second standard for data base traffic would effectively require them to reduce access times before implementing mandatory data base access. Larger LECs, in contrast, have been permitted a small increase in access times during the early stages of data base access. Third, as noted by OPASTCO, in meeting the access time standard, larger LECs can rely to a significant degree on traffic in highly populated urban areas, where the economics of SS7 deployment are different than in rural areas. Small ITCs that serve predominantly or exclusively rural areas do not have this advantage. It would therefore be inequitable to apply the five-second access time standard to ITCs other than GTE.

17. While we could attempt to establish in this order an alternative standard, we do not believe at this point that an alternative standard is necessary. The data submitted by USTA makes clear that, wholly apart from any FCC access time standards, small ITCs will collectively achieve access times that avoid any significant degradation in the quality of 800 access service. Indeed, it appears that the majority of non-GTE ITC traffic will meet the five-second standard, and that the vast majority of this traffic will experience access times of 5.5 seconds or less. Collectively, these access times are not substantially different from those that will be offered by many of the larger LECs. Moreover, LECs that will experience longer access times generally have been using (and will continue to use) multiple access tandems. Thus, the NXX access times of these LECs are longer than usual, and the data base access times will not be substantially longer than the NXX times. In light of these considerations, we do not believe it necessary to establish an alternative access time standard for non-GTE ITCs.[24]

18. The flexibility that we have afforded ITCs in planning their participation in 800 data base service has done much to encourage their voluntary efforts. Indeed, the vast majority of ITCs have indicated that they will voluntarily provide 800 data base access.[25] We nevertheless believe that it is critical to the success of number portability to ensure that all ITCs convert from NXX access to data base access at the same time as other LECs. Unless this occurs, 800 calls originated by nonparticipating ITCs might not be delivered to the proper IXC. This could result in considerable confusion, as well as billing problems and blocked calls. To avoid this possibility, we must revisit the question that we earlier considered in the Reconsideration Order of whether ITC participation in 800 data base should be mandatory.[26]

19. In the Reconsideration Order, we declined to require participation in 800 data base by ITCs other than GTE and instead relied on their voluntary efforts. However, we stated that, if necessary, we would revisit this question. We now believe that it is in the public interest to require that ITCs participate in 800 data base to ensure that a nondisruptive, operationally sound implementation of the data base can occur and accordingly, we now require that all ITCs that currently offer NXX access convert to 800 data base access on the same date other LECs do.[27] We do not believe that this requirement will unduly burden ITCs

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because the results of its survey are taken from a cross-section of the ITC industry, these results should reflect the access times of all non-GTE ITCs, including those not sampled.

[24] We further note that it would be difficult if not impossible to establish alternative access time standards. Given the differences among ITC networks, any single standard would be arbitrary and inappropriate as to at least some ITCs, and separate standards for each ITC would clearly be impracticable.

[25] *See* Letter from Martin T. McCue, General Counsel, USTA, to Donna R. Searcy, Secretary, FCC, May 8, 1992.

[26] *See* 6 FCC Rcd 5426, para. 26.

[27] On June 11, 1992, Beehive Telephone (Beehive) submitted a petition claiming that it was unaware of the actions that the Commission had taken in this proceeding and that as a result, it had not had sufficient time to prepare its network to provide 800 data base access. Beehive requests that the Commission permit it to retain its assigned NXX code (629) for one year so that it can engineer and install 800 data base facilities and equipment.

This proceeding has been pending since 1986. During that time, the Commission has issued a Notice of Proposed Rulemaking, a Supplemental Notice, a Report and Order, a Memorandum Opinion and Order, a Reconsideration Order, and several other orders. All of these items appeared in the Federal Register. The 800 data base system has also received considerable attention in the trade press. Under the circumstances, Beehive has not demonstrated sufficient cause for its requested relief. Moreover, Beehive does not explain why it needs to be able to retain its old NXX or the harm that would ensue if it does not. We therefore deny Beehive's petition as inadequately supported.

since we have provided them the latitude to choose, from among a wide variety of architectural arrangements, the most efficient and cost effective means of providing 800 data base access. Moreover, in clarifying that ITCs are not required to meet the five second acess time standard, we are confident that ITCs will be able to participate in 800 data base without disruption to their current operations.

20. We expect that the BOCs and GTE will continue their commitment to work with smaller ITCs in order to devise a truly ubiquitous 800 data base system. In addition, we expect that ITCs themselves will continue efforts to diligently pursue their plans for SS7 deployment and move toward decreasing their access times as quickly as possible. We also expect that United, which previously received a waiver of the five-second/97% access time standard, will continue to accelerate its SS7 deployment strategy in a manner designed to meet the access times specified in its waiver petition.

## IV. RETENTION OF NXX ACCESS

### A. Petitions for Reconsideration

21. Allnet asks us to reconsider our decision not to requirea limited NXX option.[28] In addition, National Data asks us to clarify that we will consider any future petitions from end users seeking a limited NXX option.[29]

22. Allnet claims that LEC pricing of SS7 interconnection may preclude small IXCs from using this capability.[30] It also questions whether SS7 interconnection capabilites will actually be available to small IXCs by March 1993 and whether this technology will be implemented in reliable fashion.[31] Citing these concerns, Allnet asks that small IXCs be permitted to continue using their current NXX access until the seven largest IXCs providing 800 service have received data base access and SS7 interconnection for at least six months without any adverse effect upon service.

23. National Data does not seek the establishment of a limited NXX option at this time. However, it asks that if it becomes apparent that data base access will be substantially more expensive than NXX access, users be permitted to petition for a limited NXX option.[32] It asserts that NXX and data base access can be concurrently provided without affecting the technical quality of either service, including access times. It argues that if users face enormous increases in their 800 service costs, they are likely to seek non-public switched telephone network solutions to their communications needs in place of 800 service.

### B. Positions of the Parties

24. Aeronautical Radio supports Allnet's request for a limited NXX option. It claims that such an option is appropriate in light of concerns about the technical quality and cost of data base access. In addition, it argues, a limited NXX access option would help to safeguard against possible pricing and service abuses and foster competitive pressures in the IXC and LEC industries.[33]

25. A coalition of sixteen small, regional IXCs (the IXC group) also supports a limited NXX option.[34] Specifically, it requests that its members be permitted to retain a limited NXX option until such time as the switching equipment that they use is capable of receiving SS7 service, or until two years after 800 data base service goes into effect, whichever comes earlier. The IXC group claims that its members currently use or have contracted to use DCO-CS switching equipment, manufactured by Siemens Stromberg-Carlson (Siemens), which does not have SS7 signaling capabilities.[35] It maintains that Siemens has indicated that these switches will not be SS7-compatible until at least the end of the first quarter of 1993, and that it will take as much as two years to equip all of these switches with SS7 capabilities. It argues that, without the ability to receive SS7 interconnection, members of the group will be unable to match the access times of other IXCs and will thus be at a competitive disadvantage.

26. Six of the BOCs, as well as AT&T, Sprint, and USTA, oppose the requests for a limited NXX option.[36] They argue that Allnet's request is premature, in that issues relating to the testing and deployment of data base access are currently being addressed as part of the implementation process. In addition, they argue that in limiting the number of IXCs providing data base access, Allnet's proposal would significantly reduce the benefits of number portability. They also argue that an NXX option would result in added costs by requiring retention of duplicative screening systems. USTA argues, in particular, that a limited NXX option would present significant administrative and regulatory burdens.[37] For example, it states, the Commission would be forced to resolve such issues as which carriers would receive NXX codes, which codes, and how many, as well as when, if ever, the NXX access option would be eliminated. USTA also asserts that Allnet's proposal would give a select group of IXCs an

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[28] Allnet Petition for Reconsideration, filed November 29, 1991. Allnet asks us to rule on a variation of the NXX option that we considered and rejected in the Reconsideration Order. Whereas the Reconsideration Order considered a limited NXX option that involved currently unassigned NXXs, Allnet proposes that certain IXCs be permitted to continue using their current NXXs.

[29] National Data Petition for Limited Reconsideration, filed November 15, 1991.

[30] Allnet Petition at 1-2.

[31] *Id.* at 6.

[32] National Data Petition at 4.

[33] Aeronautical Radio Reply at 1-6.

[34] Letter from Eric Fishman, Attorney for IXC group, to Rick Firestone, Common Carrier Bureau Chief, filed February 28, 1992, seeking limited NXX option. The IXC group consists of: RCI Long Distance New England, Inc. d/b/a Long Distance North; ICON; Napa Valley Telecom Services; Suntel; United Communications, Inc.; Flex Communications; Bittel Telecommunications Corporation; Midwest Electric Service, Inc.; Westel, Inc.; Call America Business Communications Corporation; Long Distance America; Thrifty Tel, Inc.; American Sharecom, Inc.; Call America; DigiTel Long Distance, Inc. (Fibernet Communications Corp.); and Execuline of Sacramento, Inc.

[35] IXC group Letter at 1-2.

[36] *See* Ameritech Comments at 4; BellSouth Comments at 3; NYNEX Comments at 7-8; SWBT Comments at 6-7; Pacific Reply at 3-4; US West Comments at 4-5; AT&T Comments at 6-7; Sprint Comments at 3-4; USTA Comments at 1-2.

[37] USTA Comments at 2.

effective veto over deployment of a service that the Commission already has determined to be in the public interest. GTE asserts that the retention of an NXX option would provide tremendous incentives for IXCs to frustrate the entire 800 data base plan by staying with NXX access.[38]

27. NYNEX asserts that retaining NXX access, even for a limited number of NXXs, would require it to maintain NXX translation tables, which would otherwise be unnecessary, in all its switches. It states that to implement the NXX option, it would have to revise manually approximately 750 translations on each of its switches in order to separate NXX and data base traffic.[39] NYNEX estimates that to complete and test these translation changes in its network would require approximately 33,600 hours at a cost of approximately $1,344,000.[40] It asserts that it could not complete this work, as well as the substantial work necessary to implement data base access, by March 1993.

28. Ameritech, BellSouth, and US West similarly claim that a limited NXX option would entail many hours of additional work to change switch translation tables.[41] They assert that if required to perform this work, they would not be able to implement 800 data base with a limited NXX option by March 1993. According to Ameritech, a limited NXX option for only 20 NXX numbers would add 4,500 hours to its workload. BellSouth claims that implementing)a limited NXX option coincident with 800 data base would add approximately 8,000 hours to its workload. Ameritech says further, that the limited NXX option would increase the probability for system error, because dual methods and procedures would be required to accommodate the option. In addition, SWBT and BellSouth assert that the option would require that current test plans for 800 implementation be rewritten to accomplish the substantial NXX testing that would have to occur. SWBT also maintains that access times could increase as a result of the complexities that maintaining a limited NXX option would entail.[42]

29. ITAA supports National Data's petition, noting that if LECs do not charge inflated rates for data base access, users may not seek a limited NXX access option.[43] AT&T also supports National Data's petition, claiming that any interested party should be allowed to petition for the limited NXX option if data base implementation problems are encountered.[44] Four BOCs and MCI oppose it.[45] They argue that 800 access rates have not yet been determined and that National Data's petition is thus premature. BellSouth claims that National Data's concerns are not well founded since end user prices are determined not by 800 access providers but by IXCs.[46]

### C. Discussion

30. Our decision in the Reconsideration Order not to retain an NXX option after implementation of nationwide data base access was based on our finding that there was insufficient evidence at that time that such an option would be useful or necessary. We also noted that an NXX option would require LECs to maintain dual screening systems for 800 calls and to screen most 800 calls twice. On balance, we concluded that the public would be best served by 800 data base access and that maintaining an NXX option could diminish those benefits and result in unnecessarily burdensome costs for the carriers. Although we did not foreclose a future petition seeking a limited NXX option, we stated that such a petition would need to be supported by specific evidence that mandatory 800 data base access prevents smaller IXCs from offering 800 services.[47] Allnet has not met this burden.

31. Allnet asks for a limited NXX option because of its concerns about the cost of SS7 interconnection and the technical quality of data base access. Allnet, however, has not demonstrated that these concerns justify the added cost of retaining two separate 800 access systems. Indeed, its claim that SS7 interconnection is beyond the economic reach of smaller IXCs is belied by the fact that it is one of several IXCs that are currently in the process of testing and implementing this capability on a widespread basis. Moreover, network reliability issues are currently being addressed and resolved in industry fora, and extensive testing of all aspects of 800 data base access will precede the implementation of this system. Allnet has not shown that these tests will be inadequate.[48] Indeed, Allnet's

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[38] GTE Reply Concerning Proposals to Waive Commission's Access Time Standards at 12-13, filed April 23, 1993.

[39] *See* Letter from Susanne Guyer, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, July 24, 1992. At this time, NYNEX states that it does not have an automated process for making translation changes. However, it asserts that even if had such automated processes, providing an 800 NXX option would still be extremely burdensome and would delay implementation. NYNEX states that those BOCs that currently have such processes in place report that, even with automation, a limited 800 NXX option would require significant man-hours to implement and maintain.

[40] *Id.* NYNEX states that this estimate does not include the one-time costs associated with technician training or the time required to verify the accuracy of switch recordings for billing. Moreover, it does not include, it says, the ongoing costs associated with maintaining both 800 data base routing and 800 NXX routing, or the costs of changing these translation tables at such time as the limited 800 NXX option is eliminated.

[41] *See* Letter from Anthony M. Alessi, Director, Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, June 2, 1992; US West Comments Concerning Proposals to Waive Commission's Access Time Standards at 10-12, filed April 13, 1992; Letter from W.W. Jordan, Director, Federal Regulatory, BellSouth, to Donna R. Searcy, Secretary, FCC, June 26, 1992.

[42] *See* Letter from William A. Blase, Jr., Director, Federal Regulatory, SWBT, to Donna R. Searcy, FCC, Secretary, June 11, 1992.

[43] ITAA Comments at 3-4.

[44] AT&T Comments at 8n. 8.

[45] *See* Ameritech Comments at 4; BellSouth Comments at 3; NYNEX Comments at 8; SWBT Comments at 4-5; MCI Comments at 10.

[46] BellSouth Comments at 2-4.

[47] *See* 6 FCC Rcd at 5426, para. 22.

[48] We recognize that there is a substantial amount of industry work that must be completed to ensure a nondisruptive implementation of 800 data base access. Included in that work is a substantial amount of intra-network and inter-network testing. If it appears that this testing cannot be completed successfully by March 1993, we will act to ensure that no carrier suffers an interruption of service or threat to network reliability. Even if Allnet's network reliability concerns were valid, the public interest would not be served by the remedy Allnet proposes, which would continue NXX access for only the smallest IXCs. On the contrary, in the event that all necessary

petition was filed well before an industry test plan was developed, so its claims as to network reliability are speculative at best.

32. Similarly, we do not believe that the IXC group has shown that a limited NXX option is necessary to the ability of its members to offer a viable 800 service. For example, in claiming that each member of the group "utilizes or is contracted to utilize DCO-CS switching equipment," for which SS7 interconnection is not yet available, the IXC group does not indicate how many such switches its members use or how much of their traffic those switches handle. Nor does it provide specific information about the overall impact on its access times of using such switches or the costs of using alternative ways to reduce access times.[49] While we do not hold the IXC group to an overly strict standard of proof in demonstrating its need for a limited NXX option, we do not believe that it provided sufficient information to show that such an option is truly necessary.

33. Allnet also fails to realistically address the costs or the administrative and technical burdens associated with maintaining a limited NXX option. Such an option, even if provided to a limited number of IXCs, would require every LEC throughout the country to maintain dual screening systems -- one to separate NXX calls from data base calls, and the other to perform the data base screening. Every switch in the country would have to be manually reprogrammed to effect this NXX screening. While BOC estimates of the man-hours that would be entailed in such an effort vary considerably, clearly a substantial amount of work would be involved.

34. Maintaining a limited NXX option would impose other costs as well. First, depending upon the number of IXCs that would be permitted to retain NXX access, this option could reduce the benefits to all 800 subscribers of number portability. More significantly, the customers of those carriers permitted to retain NXX access would be denied these benefits. Thus, whereas other 800 subscribers would be able to switch carriers without changing their 800 number, the customers of NXX carriers would be unable to do so.[50] As USTA notes, a limited NXX option would also pose significant administrative requirements.

35. Finally, given the significant workloads already faced by the LECs in deploying their SS7 networks and data base systems, the additional burdens that would be posed by a limited NXX option would likely make it impossible for LECs to meet any near term deadline for the achievement of 800 number portability. It would not be in the public interest to delay the benefits of number portability to all 800 service subscribers in order to accommodate unsubstantiated competitive concerns of a few carriers.

36. Based on the foregoing, we are not persuaded that the benefits of Allnet's proposal for a limited NXX option outweigh the public interest costs of this approach. Accordingly, we reject its request. We do not address National Data's petition, insofar as it seeks a right that it already has under Commission rules. More specifically, any entity may petition at any time to request a change in any of our rules, including those that pertain to 800 data base access. In the event that National Data or any other entity files a petition seeking a change in our rules, we will consider that petition at that time in light of the costs and benefits of the relief requested.

## V. PROVISION OF VERTICAL SERVICES BY IXCS

### A. Petition for Reconsideration

37. Ad Hoc asks us to require IXCs to purchase, as agents for their 800 customers, the LEC-provided vertical features that those customers want.[51] It asserts that such an arrangement would facilitate the establishment of a standard set of 800 data base vertical features nationwide. This, it says, would be helpful to customers when they change carriers since it would eliminate the confusion that they might otherwise experience when trying to compare disparate 800 service offerings of different carriers. In addition, Ad Hoc urges the Commission to give 800 service customers the option of ordering basic 800 service and 800 service vertical features through the SMS administrator.[52] This, it claims, would give 800 service customers an administratively easier way to change 800 service traffic.

### B. Positions of the Parties

38. National Data and Aeronautical Radio support Ad Hoc's petition.[53] They claim that if Ad Hoc's request is granted, it will be operationally easier for customers to change 800 carriers, and competition in 800 services will be enhanced. National Data further supports Ad Hoc's request that the Commission permit customers to order basic 800 service and vertical features through the SMS administrator.[54] Such an option is critical, it claims, for users that operate complex networks, or that rely on several IXCs to satisfy their 800 service needs, because it would provide assurance that disruptions to service would not occur when users change IXCs or service functions.

39. SWBT, NYNEX, and USTA assert that Ad Hoc's concerns could best be addressed by allowing the LECs to

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testing of the data base system is not successfully completed, the public interest would require that the NXX system be retained for all carriers until such time as the data base can be implemented in a reliable fashion.

[49] For example, the IXC group maintains that SS7 technology for DCO-CS switches will become available in the first quarter of 1993, but does not address how overall access delays could be minimized by focusing early implementation efforts on more heavily used switches. Nor does it address how an IXC could use a combination of direct trunk arrangements and/or resale to obtain further access time reductions. It also fails to describe any stepsh)0that might have been taken to seek an accelerated implementation schedule from Siemens.

[50] Thus, they would have the advantages of number portability in competing for their competitors' customers -- who would be able to switch carriers without changing their number -- but their own customers would remain unable to change carriers without an 800 number change. Moreover, the NXX option would have the perverse effect of rewarding IXCs that have not implemented SS7 interconnection capability, with faster access times than those provided to other IXCs. Because there will generally be a small, temporary increase in access times during the early stages of data base access, carriers that could opt out of data base access would be able to avoid this increase.

[51] Ad Hoc filed its Petition for Partial Reconsideration on November 14, 1992.

[52] Ad Hoc Petition at 7-9.

[53] National Data Comments at 1-2; Aeronautical Radio Reply at 1-4.T

[54] National Data Comments at 3.

sell vertical features directly to 800 subscribers.[55] SWBT claims that this arrangement would ensure that a consistent set of alternative services is available to customers should different IXCs choose not to offer all these features in their service arrangements.[56] USTA states that it is wrong for the Commission to limit to any degree the sale of vertical services. At the very least, it says, the Commission "should allow an end user to contract with an IXC to require that carrier to purchase LEC vertical services as the customer's agent, on customer demand, or to adopt exchange carrier service recommendations."[57] US West states that while Ad Hoc's concerns that 800 customers may not have the ability to use multiple 800 carriers with a single 800 number is legitimate, its proposal that IXCs be forced to offer new features against their will is not a particularly attractive course of action.[58]

40. AT&T, MCI, and Sprint oppose Ad Hoc's petition. They argue that if a particular carrier is "insufficiently responsive" to a customer's needs, other carriers stand ready to provide quality service.[59] MCI and Sprint further argue that there is no reason to believe that the transition from one 800 service provider to another will cause problems since both carriers and customers have a great deal of experience in planning and coordinating such transitions.[60]

41. AT&T, MCI, Sprint, Ameritech, Southwestern, NYNEX, and US West oppose Ad Hoc's request that customers be permitted to order basic 800 service and vertical features through the SMS administrator.[61] They argue that placing the SMS administrator in the position of selling 800 services while simultaneously administering the 800 data base creates an irreconcilable conflict of interest. AT&T and MCI further argue that the sale of these services by the SMS administrator would interfere with the relationship between IXCs and their customers and unduly disrupt the IXCs' ability to manage traffic on their own networks.[62] NYNEX argues that Ad Hoc's request should be rejected as untimely since this proceeding has been ongoing for many years and Ad Hoc did not raise it earlier.[63]

### C. Discussion

42. In the Reconsideration Order, we rejected a request that we require IXCs to offer subscriber-requested vertical features available from a LEC. We stated that once the data base system was implemented, competition should ensure that carriers accommodate the needs and desires of 800 users for vertical features.[64]

43. Ad Hoc has not persuaded us that this decision was incorrect. Although we agree with Ad Hoc that 800 service providers may functionally differentiate their 800 service offerings, we do not believe that this alone would so confuse users of 800 service that they would be reluctant to seek out those carriers that could most effectively satisfy their 800 services needs. Indeed, as a number of IXCs point out, carriers and customers have a great deal of experience in planning and coordinating moves from one carrier to another, and if a particular carrier is insufficiently responsive to customers needs, other carriers stand ready to provide quality service. In short, based on the current record, we do not expect serious provisioning problems to arise.

44. Moreover, we are not persuaded that the relief that Ad Hoc requests would provide the greatest flexibility to users. Although Ad Hoc does not specify what capabilities would be included in a "standard" set of 800 data base vertical features, we believe that market pressures will force the IXCs to adapt to their customers' needs in such a way that the vertical features that customers most often request -- presumably those that would be found in any "standard" set of services -- would be available to users without the remedial regulation that Ad Hoc requests. In addition, we would expect that market forces would encourage carriers to make every effort to develop or adapt services to accommodate their customers' changing needs -- providing far greater flexibility to users than the creation of a standard set of vertical features. Moreover, there is no guarantee that a standard set of services would not change as the needs of customers change, potentially creating the very situation that Ad Hoc seeks to avoid.

45. We are also unpersuaded that we should give 800 service customers the option of ordering basic 800 service and 800 service vertical features through the neutral SMS administrator of the 800# data base. We have twice decided in this proceeding that LECs should be permitted to sell vertical features only to those entities that purchase basic 800 access.[65] One of the important considerations underlying this restriction was our desire to ensure no unwarranted intrusions upon the relationship between IXCs and their customers. To allow end users to order vertical services from the SMS administrator, as Ad Hoc requests, would undermine this goal. Indeed, assuming that under Ad Hoc's proposal the SMS administrator would sell LEC-provided vertical features, Ad Hoc's request runs directly counter to our vertical services rules.[66] We adopted and then affirmed those rules after a careful balancing of all affected interests. Ad Hoc has not demonstrated that we should abandon these rules now.[67] Accordingly, we deny its petition.

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[55] SWBT Comments at 2; NYNEX Comments at 5 n.4 ; USTA Comments at 4-5.

[56] SWBT Comments at 1-2.

[57] USTA Comments at 4-5.

[58] US West Comments at 5-6. *But see* MCI Reply at 5-6

[59] AT&T Comments at 3-4; MCI Comments at 6-7; Sprint Comments at 6-7.

[60] Sprint Comments at 7; MCI Reply at 6-7.

[61] AT&T Comments at 5-6; Ameritech Comments at 1-2; SWBT Comments at 3-4; NYNEX Comments at 5-6; MCI Comments at 7; Sprint Comments at 7-8; MCI Reply at 6-7.

[62] AT&T Comments at 5-6; MCI Reply at 6-7.

[63] NYNEX Comments at 5-6.

[64] *See* 6 FCC Rcd at 5428, para. 36 n.56.

[65] *See id.* at 5428, paras. 34-36; 4 FCC Rcd at 2830-2831, paras.53-55.

[66] This presumably is what Ad Hoc intended, since limiting the SMS administrator to IXC-provided vertical features would render this remedy useless to Ad Hoc: users of interstate 800 service would still only be able to obtain those vertical features that their IXC chose to offer.

[67] On July 10, 1992, Sprint filed a petition for declaratory ruling on the related issue of whether the administrator of the Number Administration and Service Center (NASC), which is

## VI. TREATMENT OF SS7 COSTS

### A. Petition for Reconsideration

46. California requests that the Federal State Joint Board examine whether the costs of digital technologies that support 800 service are fairly apportioned between state and federal jurisdictions under existing separations rules.[68] In the event that this request is denied, California requests, in the alternative, that we clarify or reconsider our decision thatexisting accounting and separations rules should apply for SS7 technology used to support 800 data base services.

### B. Positions of the Parties

47. NARUC supports the petition and urges the Commission to refer cost allocation issues raised by the use of new technologies to the Joint Board for consideration.[69] NYNEX and USTA oppose the petition. NYNEX argues that California's request is repetitive since the Commission has twice determined that introductions of SS7 technology that support 800 service do not require any changes in existing accounting or separations rules.[70] USTA opposes the petition on the grounds that the issue it raises is not an appropriate subject for this proceeding.[71] BellSouth does not object to California's request. Nevertheless, it asserts that resolution of the petition should not justify further delay in the implementation of 800 data base service.[72]

### C. Discussion

48. Cost allocation and recovery practices for SS7 technologies are under discussion by the Federal State Joint Board in CC Docket 80-286. Specifically, the Joint Board is discussing whether SS7 technology costs are fairly apportioned under existing separations rules. We agree with this approach and we support the action that the Joint Board has taken to date. Since the cost allocation issue that is the subject of California's petition is now being discussed by the Joint Board, we dismiss California's petition as moot.

## VII. ORDERING CLAUSES

49. IT IS ORDERED, that pursuant to 47 U.S.C. Sections 151, 154(i) and (j), 201, 202, 203, 218, 303(r), and 405, and 5 U.S.C. Section 553, the petitions for reconsideration, partial reconsideration and/or clarification are GRANTED IN PART and DENIED IN PART, as provided herein.

50. IT IS FURTHER ORDERED THAT the petition filed by California is DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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the organization that provides operational support for the SMS, should be authorized to make 800 routing changes or changes to the entity designated to manage and administer an 800 customer's individual data base record -- referred to as the "RESPORG". We do not prejudge the merits of that petition and urge parties not to read our ruling here as signalling approval or disapproval of that petition. Pending before us also is a petition filed by Competitive Telecommunications Association (Comptel) for expedited declaratory ruling that "area-of-service-routing" (*i.e.*, directing the routing of calls to different IXCs based on place of origination of the call) is a part of basic 800 access service. We expect to resolve both petitions in the near future.

[68] California Petition for Clarification or in the Alternative Petition for Further Reconsideration filed August 9, 1992.

[69] NARUC Comments at 1-5.

[70] NYNEX Comments at 6-7.

[71] USTA Comments at 5.

[72] BellSouth Comments at 4.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**FO Docket No. 92-206**

In the Matter of

Amendment of Part 13 of the
Commission's Rules to Privatize
the Administration of Examinations
for Commercial Operator Licenses
and to Clarify Certain Rules

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: January 14, 1993; Released: February 12, 1993**

By the Commission:

## I. INTRODUCTION

1. On August 21, 1992, we adopted a *Notice of Proposed Rule Making (Notice)* in the above-captioned proceeding.[1] In the *Notice*, we proposed to privatize the examination of applicants for commercial radio operator licenses and to clarify certain radio operator rules. This *Report and Order (Report)* adopts rules to privatize commercial license examinations and establishes rules for implementing the new system. It also clarifies and updates the rules as proposed.

## II. BACKGROUND

2. In 1986, we released a *Notice of Inquiry* seeking comment on whether privatizing commercial radio operator license examinations would serve the public interest.[2] As a result of that proceeding, we sought and received statutory authority to delegate preparation and administration of operator examinations to one or more private entities.[3] Subsequently, we adopted a *Notice* proposing to amend the Commercial Radio Operator Rules, 47 C.F.R. Part 13, to privatize the six Commission-issued certificates, licenses, permits, or endorsements (licenses) that require an applicant to pass an examination.[4] In response to the *Notice*, we received 22 comments and 11 reply comments.[5]

## III. DISCUSSION

3. The comments uniformly support our proposal to privatize commercial radio operator examinations. They differ widely, however, in the details of how this should be accomplished. In the paragraphs below we address the issues raised regarding privatization. Prior to addressing these points, however, we believe it would be useful to state again the objective of this proceeding. Our objective here is to establish a private sector operator examination system that meets the need of applicants for more frequent examination opportunities at convenient locations, the need of industry for examinations that reflect state of the art technology and modern operating conditions, and the need of the Commission to reduce the resources it must expend on commercial operator licensing. This goal is necessitated by our continuing desire to provide better service to the public and by the Commission's resource constraints.

### A. Privatization.

4. In the *Notice* we noted the continuing demand for commercial operator licenses[6] and the problems associated with the current testing system, including limited opportunities to take the tests and out-of-date examination questions. We also stated our belief that these problems will continue in the foreseeable future due to ongoing Commission resource constraints. To resolve these problems, we proposed turning the commercial operator examination function over to the private sector.[7]

5. All of the commenters agree with our analysis of the problems and support privatization of radio operator examinations. For example, NARTE and Mr. Lenahan state that privatization could make testing more accessible.[8] The American Radio Association (ARA)[9] contends that the examination questions are outdated and that privatization would permit exams to be offered in any location where sufficient demand exists.[10] Mr. Maia argues that the problems the Commission faced ten years ago in terms of diminishing resources to administer amateur radio examinations, out-of-date questions, and compromised examinations are the same problems the commercial

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[1] *See Notice of Proposed Rule Making*, FO Docket No. 92-206, 7 FCC Rcd 5890 (1992).

[2] *See* 51 Fed. Reg. 36415 (1986).

[3] *See* Federal Communications Commission Authorization Act of 1990, Pub. L. 101-396, 104 Stat. 848.

[4] These licenses are: (1) First Class Radiotelegraph Operator's Certificate, (2) Second Class Radiotelegraph Operator's Certificate, (3) Third Class Radiotelegraph Operator's Certificate, (4) General Radiotelephone Operator License, (5) Marine Radio Operator Permit, and (6) Ship Radar Endorsement. In addition, the Commission stated in the *Report and Order* in Docket 90-480, 7 FCC Rcd 951 (1992), that it intended to establish two new radio operator licenses, a GMDSS Radio Operator's License and a GMDSS Radio Maintainer's License, that also require the applicant to pass an examination. These are the examinations the Commission proposed to privatize.

[5] Parties filing comments and reply comments are listed in Appendix A. The National Association of Radio and Telecommunications Engineers, Inc. (NARTE) filed comments one day late with a *Motion for Leave to Accept Late Filed Comments (Motion)*. In the interest of having the most complete record possible in this proceeding, we will grant NARTE's *Motion* and accept its comments.

[6] In 1991, approximately 12,100 examinations were administered to applicants for commercial radio licenses, permits, and endorsements.

[7] *Notice* at 3, 7.

[8] Comments of NARTE at 4, John C. Lenahan, Jr. at 1.

[9] ARA is an organization of seagoing U.S. merchant marine Radio Officers who sail on U.S. flag vessels. Its members serve as the operators of shipboard communications and related electronic equipment.

[10] Comment of ARA at 2, 6.

examination system faces today and that privatization solved those problems.[11] In short, the commenters contend that the private sector can offer more up-to-date tests and more frequent examinations in many more diverse and accessible locations than the Commission. We agree. Accordingly, we are amending our rules to privatize commercial radio operator examinations.

**B. Number of examining entities and entry criteria.**

6. In the *Notice* we asked that commenters specifically address certain issues. One of those issues was "the criteria to be used by the Commission to select the examining entity or entities."[12] The vast majority of commenters recommend we allow multiple entities to give the examinations. For example, Mr. Maia recommends the only limit on the number of entities should be our ability to deal with them.[13] He suggests we use a system similar to the amateur service's Volunteer-Examiner Coordinator (VEC) system."[14] ARA states that we should use an open selection process wherein all entities that meet certain criteria are authorized.[15] Messrs. Benner and Mahoney suggest that we provide marketplace competition by authorizing multiple testing entities.[16] Mr. Smith and The Idaho Power Company (Idaho Power) specifically oppose authorization of only one entity for testing.[17] On the other hand, WESMAC[18] wants us to establish one exclusive entity for each of six geographical regions, while Elkins Institute wants us to establish one exclusive entity nationwide.[19]

7. Our experience over the last eight years with the VEC system, which employs multiple entities, has been very favorable.[20] This system has served the needs of licensees and individuals admirably. Further, we believe a system with multiple entities managing operator examinations will encourage competition between the entities and result in good service, responsiveness, and lower prices to the applicants. Therefore, we will certify multiple entities.[21] We are concerned, however, that the number of entities certified to administer operator examinations not become so large that the program becomes administratively difficult or burdensome. For this reason, we will delegate authority to the Chief, Private Radio Bureau to place a cap on the number of entities certified to administer examinations. The number of examination managers we certify, however, will be sufficient to assure at least the level of service presently available to the public, and to create a strong incentive for the managers to compete for examination administration business without causing undue administrative burdens.

8. As for entry criteria, several commenters suggest we use only organizations that have clearly demonstrated professional marketplace qualifications and dedication.[22] The United States Merchant Marine Academy (USMMA) recommends we emulate as far as possible the U.S. Coast Guard with regard to authorization of external entities to act as examiners.[23]

9. We decline to adopt any special entry criteria at this time. We believe such artificial criteria could preclude certain entities who are sincerely interested in giving operator examinations from becoming Commercial Operator License Examination Managers.[24] Rather, we will announce a filing window for accepting requests from entities that desire to become certified examination managers. If, however, we receive more requests for certification than we believe are necessary to effectively serve the public or more requests than administrative efficiency permits us to grant, we will give a preference to those entities proposing to provide the best level of service. The terms of the proposal we receive from an entity, including the proposed level of service, will be incorporated by reference into an agreement if the entity is certified as an examination manager. The entity's proposal thus will become the minimum level of service we will expect it to provide.[25] See paragraphs 19-20.

**C. Responsibilities/Standards**

10. In the *Notice* we also asked commenters to address the regulatory or operating constraints that should be placed on examination managers including measures to prevent or avoid potential conflict-of-interest situations.[26] WESMAC asks that we regulate such entities by

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[11] Comments of Frederick O. Maia at 3.

[12] *Notice* at 3.

[13] Comment of Frederick O. Maia at 6.

[14] The VEC system is a private examination system used in the amateur service. In this system, examinations are given for four of the five classes of amateur service licenses. Each applicant for an amateur service license other than the Novice Class and each applicant for a change in operator class, is required to apply through the VEC system. *See* Sections 97.501-97.527 of the Commission's Rules, 47 C.F.R. §§ 97.501-97.527.

[15] Comments of ARA at 6.

[16] Comments of Kenneth J. Benner at 1, John T. Mahoney at 1.

[17] Comments of Ron Smith at 1, Idaho Power Company at 1.

[18] WESMAC is a training organization that offers pre-employment and on-the-job training and evaluation of technicians in the electronics industry throughout California and, occasionally, Arizona.

[19] Comments of WESMAC at 2, Reply Comments of Elkins Institute at 1-3.

[20] In the VEC system, there are 18 organizations that are authorized to coordinate examinations nationwide. As a practical matter, however, all but three of these organizations operate in a local or regional area. This system administered examinations to more than 103,000 persons at 8,118 sessions in 1991.

[21] As we did with the VECs, we will certify entities through the use of a Memorandum of Understanding (MOU). See paragraph 20. A private sector entity must be certified in order to administer commercial radio operator examinations.

[22] Comments of Kenneth J. Benner at 1, Richard M. Sealock at 1, John T. Mahoney at 1, and Idaho Power Company at 1.

[23] Comments of U.S. Merchant Marine Academy at 1.

[24] For example, requiring entities to offer all commercial radio operator tests or provide nationwide service could eliminate some educational institutions from becoming examination managers.

[25] In the comments, six entities expressed an interest in becoming examination managers. Based on this interest, we do not expect to receive more requests for certification than administrative efficiency permits. If we do, however, we will give preference to those entities willing to provide the best service such as offering examinations over the broadest area or for the most types of licenses. For example, an entity willing to test for all types of operator licenses nationwide would be given a preference over entities only willing to test in a regional or local area and entities only willing to test for some of the operator licenses.

[26] *Notice* at 3.

establishing broad, general requirements such as the minimum number of times an examination manager must offer examinations, record keeping requirements, and the broad structure of the examinations.[27] WESMAC also says conflict-of-interest problems can be eliminated by a double-blind examination system.[28] ARA suggests that we require that an examination manager be independent of all maritime interests and not be engaged in the business of offering training courses designed solely to prepare applicants to pass the commercial operator examinations.[29] Mr. Maia states that requiring all examination managers to use questions randomly selected from a publicly available pool of questions eliminates potential conflict-of-interest situations because the only confidential element is the knowledge of which questions are going to be on a particular version of an examination.[30] NARTE contends that competition will make unnecessary any need for heavy handed regulation by the Commission.[31]

11. We agree with the commenters that competition between multiple examination managers and the use of a common question pool reduces the necessity for detailed regulation and that the rules do not need to specify more than a manager's basic duties and responsibilities. Based on the information we have before us and our experience with the VEC system, we shall require that an entity that desires to be an examination manager agree to be responsible for (1) announcing examination sessions, (2) verifying the identity of each examinee, (3) preparing, administering, and grading examinations, (4) notifying examinees of examination results (pass/fail), (5) certifying that an applicant has passed the test elements required to qualify for a commercial operator license and issuing a document to the examinee indicating what elements were passed (proof-of-passing certificate) within 10 days of the examination, (6) ensuring that no activity takes place that would compromise the examination and that no unauthorized material is permitted in theexamination room,[32] (7) handling post-examination questions and problems, and (8) treating all applicants equally regarding fees or services rendered.[33] Further, to avoid any appearance of impropriety, examination managers cannot administer an examination to an employee, relative, or relative of an employee. The public must be assured that when a test is given, it is given with total impartiality. These requirements are contained in the new rules adopted today.

12. In addition to these duties, we are establishing standards to ensure that the Commission's licensing process is not undermined. For example, without standards addressing the difficulty of passing an examination, applicants could seek the examination manager giving the easiest test or using the lowest passing score. In order to eliminate these types of problems and ensure the integrity of the system we will establish the following standards.

(1) Common Question Pool. The Commission will establish the common question pool which will consist of a question pool for each examination element. All examination questions must be taken from the respective question pools.

(2) Exam standards. We are specifying the topics covered in each element, the number of questions in each element[34] and the minimum score needed to pass.

**D. Common Question Pool**

13. As discussed above, there will be one common question pool. This pool will be made up of a number of smaller question pools, one for each examination element. The commenters argue that most of the current examination questions are out-of-date. The National Association of Business and Educational Radio, Inc. (NABER) and ARA state that we should develop and periodically update a large pool of questions that could be used to computer "generate examinations."[35] ARA and Elkins Institute suggest that we form a Federal Advisory Committee to develop the questions and update them every two years.[36] ARA also states that the Commission should maintain the database and generate examinations when requested by an examiner.[37]

14. We agree that a number of questions are out-of-date. To resolve this problem, we intend to revise the current examination questions so that they reflect the state of the art and the current duties and responsibilities of commercial radio operator licensees. To accomplish this, we will first determine what licensees must know to perform their duties properly. We will issue a public notice soliciting possible new test questions and comments on the topics and number of questions in each examination element.[38] We hope that the private sector, including individuals, employers, associations, educational institutions and potential examination managers, will help us in this regard. We also will solicit input from subject matter experts. Once we have selected the questions to make up the common question pool we will release the questions and the algorithm for preparing examination

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[27] Comments of WESMAC at 2.

[28] *Id.* Under a double-blind system, the person administering the examination has no control over preparation of the version of a test an applicant is given, and the examination is graded at another location by a different examiner who does not know the name of the examinee.

[29] Comments of ARA at 7.

[30] Comments of Frederick O. Maia at 10.

[31] Comments of NARTE at 10.

[32] For example, examination managers must prohibit examinees from bringing or using programmable or printing calculators, books and other reference material, radios, or cameras in the examination room or area.

[33] The only exception to this is for handicapped applicants. Examination managers must employ accommodative procedures similar to those provided by VECs for handicapped applicants.

[34] Although we have specified the number of questions for each element in the rules, we intend to solicit public comments on the topics and the questions that form the common question pool. See para. 14. Based on the information interested parties submit, we may modify the current examinations (*i.e.*, the number of questions on an element or the topics that each examination element must cover).

[35] Comments of NABER at 10-11 and ARA at 3-4.

[36] Comments of ARA at 8. Reply Comments of Elkins Institute at 2.

[37] Comments of ARA at 8.

[38] For example, commenters may indicate that we should place heavier or lighter emphasis on a particular topic.

question sets by public notice.[39] We also believe the examination managers should assist the Commission in keeping the question pool up-to-date. We will ask that they periodically submit recommendations to add or delete questions. Because technology and specific conditions often change quickly, we are delegating authority to the Chief, Private Radio Bureau to modify the common question pool, the required topics, and the number of questions in each element.[40] This will allow the tests to be easily updated as ARA requests.

**E. Commission Oversight**

15. The steps we have taken in this proceeding reflect first and foremost our desire to improve the commercial radio operator licensing process and thereby provide better service to the public. We are confident that entities certified as examination managers will serve the public in a responsible manner. We have, however, placed them in an important position in the overall commercial radio operator licensing process. We must, therefore, closely watch their performance.[41] As one check against fraud or abuse, we reserve the right to require applicants for, and holders of, a commercial radio operator license to retake the examination(s) at our discretion.

16. Further, where it appears that an examination manager is not performing its duties in a manner consistent with the public interest, the Commission may on its own motion or at the public's request conduct an inquiry into the manager's performance. While we do not intend to initiate such an inquiry on the basis of unsubstantiated complaints, we will do so if there appears to be a pattern of failing to perform the responsibilities and requirements adopted herein. After our investigation, we will determine whether decertification or other action is warranted.

17. In the *Notice*, we requested commenters to address the amount and reasonableness of fees to be charged for administering examinations.[42] NABER states that it is unable to provide estimates of costs or expenses until final rules are adopted.[43] Mr. Maia points out that if the commercial operator examination program is tacked onto the VEC system, there may be significant economies of scale and minimal marginal increases in the costs already being incurred. Otherwise, this program would have to recover all costs associated with it, such as paper, postage, site rental, and transportation.[44] ARA states that we should set a standard fee for administering an examination, but allow an increased fee for a service such as examination on demand.[45]

18. A number of entities have stated they are interested in becoming an examination manager. We believe that multiple managers-will allow an examinee to select the manager that best meets his or her needs and that competition between managers will help ensure reasonable fees. We also agree with WESMAC and ARA that the determination of the level of services an examination manager chooses to offer (for example testing on demand, as compared with regularly scheduled sessions) and the charge for that service, should not be limited by a Commission-imposed fee structure. Therefore, we are not establishing a fee structure at this time. We will, however, require entities that apply for certification as examination managers to include a proposed fee structure and justification, including cost estimates, in their proposal. We expect fees charged to be reasonable. Further, we will require entities certified as examination managers to file an annual report justifying any change in fee structure they wish to implement, and showing the number of examinations they administered and the pass rate of applicants taking the examinations. If we do not find a sufficient number of acceptable managers to provide meaningful competition, we will revisit this issue as part of our oversight responsibility.

**F. Certifying examination managers.**

19. A number of entities state they are capable of performing operator license testing and request that they be considered for participation in this program. The International Society of Certified Electronic Technicians (ISCET) states that it offers multiple certification options and currently administers 6,000 to 6,500 examinations annually.[46] WESMAC submitted a proposal for administering examinations and states that it has presented courses that prepare technicians for the General Radiotelephone Operator License examination. ARA, NABER, Frederick O. Maia, and The Roach Organization, also are willing to consider becoming examination managers, depending on the final rules we adopt.[47]

20. We are amending our rules to delegate authority to the Chief, Private Radio Bureau, to enter into written agreements with qualified entities who desire to be examination managers. The form and general terms of these agreements will be announced at a later date by Public Notice.[48] This announcement will also specify when entities interested in becoming examination managers may request consideration.

21. We will announce by Public Notice, and update as necessary, the names and addresses of entities that we have certified as examination managers when that process is complete. At that time, persons wanting to obtain a

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[39] Until the new pools are available, we may ask examination managers to use our existing examinations.

[40] For the purposes of this proceeding we have established examination elements and the topics the question pools will cover. These may change as a result of input obtained through the Public Notice.

[41] We note that Congress gave the Commission specific authority to prescribe regulations to select, oversee, sanction, and dismiss any person authorized to prepare and administer examinations for commercial operator licenses. *See* 47 U.S.C. § 154(f)(5)(B).

[42] The statute permits an examination manager to recover from examinees "such fees as the Commission permits, considering such factors as public service and cost estimates submitted by such person." *See* 47 U.S.C. Section 154(f)(5).

[43] Comments of NABER at 12.

[44] Comments of Frederick O. Maia at 12-13. Mr. Maia also suggests we set a maximum fee of $35.00 per test per applicant. *Id.* at 13.

[45] Comments of ARA at 9.

[46] Comments of ISCET at 1.

[47] Comments of ARA at 8, Maia at 8, NABER at 12, The Roach Organization at 2.

[48] We anticipate at this time that the agreements will be similar to those used between the Commission and the VECs.

commercial radio operator license must go to an examination manager and take the test for the license desired or needed. When the person passes the test(s), he or she will fill out the appropriate license application Form and mail it together with a valid proof-of-passing certificate to: Federal Communications Commission, Licensing Division, 1270 Fairfield Road, Gettysburg, PA. 17325-7245.

22. While we plan to transfer the examination function to the private sector as soon as possible, it will take some time to certify examination managers, revise the question pool, and for managers to set up their systems. We will issue a separate public notice describing the special procedures for examinations for commercial radio operator licenses during this phase-in period. Questions concerning special examinations for commercial radio operator licenses should be addressed to the Commission's field offices. Questions concerning this rule making should be addressed to the Private Radio Bureau.

**G. Other matters.**

23. In the *Notice*, we proposed to delete Section 13.24 of the Commission's Rules, 47 C.F.R. Section 13.24. This section requires that an applicant must answer at least 75 percent of the questions correctly to pass a written examination. We are not adopting this proposal. We believe that the rule is reasonable, and none of the commenters indicated this standard was burdensome. We believe that the rules should specify the passing standard to maintain uniformity among multiple examination managers.

24. Our decision to privatize examinations also requires that we reorganize and clarify rules to reduce regulatory burdens and make the rules more useful for examination managers and applicants. As part of this decision, therefore, we are making editorial revisions to Part 13 to eliminate rules that limit the examination managers' flexibility in administering examinations,[49] to combine multiple rule sections that contain requirements for one license,[50] and to eliminate a class of license that will not be available under the privatized system.[51] We also are eliminating rules that are redundant, unnecessary, or obsolete,[52] to conform with the decisions we have made in this proceeding. None of these editorial revisions are significant rule revisions. We also are reorganizing the rules so that they are in a sequence that will increase licensee understanding and ease of use.

25. **Final Regulatory Flexibility Analysis.**

*Need and purpose of this Action.* This rule making proceeding was needed to obtain comments regarding our proposal to privatize examinations for licenses specified under Part 13 of the Commission's Rules. The purpose of this action is to promote excellence and efficiency in the licensing of commercial radio operators by increasing the availability, relevance, and validity of commercial radio operator examinations and reducing government expenses.

*Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis.* The commenters agree that the potential impact of these rule changes is to improve the efficiency in licensing commercial radio operators, thereby making it easier for small entities to hire licensed commercial radio operators. The commenters also recognize that the rule changes adopted in this proceeding may affect entities that voluntarily apply to become commercial radio operator license examination managers and entities that are engaged in training individuals to pass commercial radio operator examinations.

*Significant alternatives considered and rejected.* Alternatives include the Commission continuing to give examinations or contracting with another entity or entities to perform examination functions. The proposed alternative is adopted to minimize the impact on small entities.

## IV. CONCLUSION

26. In summary, we are adopting a series of rule amendments to privatize commercial radio operator license examinations. Our decision will promote excellence and efficiency in the licensing of commercial radio operators. It will also increase the availability and effectiveness of examinations and reduce government expenses. The Commission will still issue commercial radio operator licenses. We are confident of the soundness of the approach we have taken herein and the benefits to the public that will flow from this approach. Nevertheless, as with implementing any new system, we realize that changes and modifications often have to be made as experienced is gained. Therefore, we will continue to monitor progress in this area and take steps to improve the overall process when necessary.[53]

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[49] *See*, for example, Sections 13.27, 13.42, and 13.44.

[50] Requirements for the First Class Radio Telegraph Operator's Certificate are presently in Sections 13.22(b)(1) and 13.12(a).

[51] *See* Section 13.8. A Provisional Radio Operator Certificate was issued only after an applicant had passed the necessary examination requirements for the license sought. Passing the examinations at a Commission-administered test session provided a basis for us finding the applicant qualified. Under the privatized system, however, we would have no basis to find an applicant qualified until the applicant submitted his or her application and the proof-of-passing certificate showing the required examination elements were passed. The Commission would then issue the applicant the appropriate license document.

[52] For example, Section 13.22(c) specifies the certification that an applicant for a Restricted Radiotelephone Operator Permit must make. This certification is printed on FCC Forms 753 and 755, with the statement that if the applicant cannot make the certification, the applicant is not eligible for the Permit. *See also*, Sections 13.26 and 13.28(c) and (d), which contain references to radiotelephone licenses that are no longer issued, and Section 13.62, which specifies actions prohibited by other rules or statutes.

[53] For example, with the implementation of GMDSS, radiotelegraph operators are being phased out. Therefore, we may combine or eliminate the three radiotelegraph certificates in the future.

### V. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that effective March 29, 1993, Parts 0 and 13 of the Commission's Rules, 47 C.F.R. Parts 0 and 13, ARE AMENDED as set forth in Appendix B. Authority for this action is found in Sections 4(f)(5), 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(f)(5), 154(i) and 303(r).

28. IT IS FURTHER ORDERED that the Private Radio Bureau will issue Public Notices detailing the procedures an individual or organization must follow to apply to become a Commercial Operator License Examination Manager (COLEM) and specifying the questions and topics in the commercial radio operator license examination common question pool.

29. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

30. For information concerning this *Report and Order* contact William T. Cross, Personal Radio Branch, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

### APPENDIX A

**Comments were received from the following parties:**

International Society of Certified Electronic Technicians (ISCET)

The American Radio Association (ARA)

The Association of American Railroads (AAR)

Frederick O. Maia

National Association of Business and Educational Radio, Inc. (NABER)

WESMAC

Idaho Power Company

John C. Lenahan, Jr.

Fredric Stawarz

Constantinos J. Mantis

Richard D. Churchill

Tad E. Hobbs

Kenneth J. Brenner

Richard M. Sealock

John T. Mahoney, Wolters Communications Contractors, Inc.

Telecommunications Resource Associates (TRA)

Ron Smith, Communications and Emergency Products, Inc.

The Roach Organization, Inc. (Roach)

The National Association of Radio and Telecommunications Engineers, Inc. (NARTE)

SCI Maritime Training (SCI)

U.S. Merchant Marine Academy (USMMA)

The Calhoon MEBA Engineering School (MEBA)

**Reply Comments were received from the following parties:**

American Institute of Merchant Shipping

ARA

Elkins Institute

Industrial Telecommunications Association, Inc.

NABER

NARTE

National Marine Electronics Association (NEMA)

Roach

USMMA

WESMAC

WPT Publications

### APPENDIX B

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 0-Commission Organization

1. The authority citation for Part 0 continues to read as follows:

**AUTHORITY: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.**

2. Section 0.131 is amended by adding new paragraphs (h) and (i) to read as follows:

**§ 0.131 Functions of the Bureau.**

* * * * *

(h) Establishes the number of examination managers necessary to manage commercial operator license examinations under Part 13 of the rules; executes in the name of the Commission agreements pertaining to certification and employment of services of entities found qualified to prepare and administer commercial operator license examinations under Part 13 of the rules; considers requests for review of certified manager's decisions; engages in oversight of manager actions and practices; and decertifies entities that do not perform satisfactorily.

(i) Revises the common question pool, the required Elements and topics, and the number of questions in each Element for commercial radio operator license examinations, as appropriate.

3. Section 0.485 is revised to read as follows:

**§ 0.485 Commercial radio operator examinations.**

Generally, written and telegraphy examinations for commercial radio operator licenses shall be conducted at locations and times specified by commercial operator

license examination managers. (See § 13.209). When the FCC conducts these examinations, they shall take place at locations and times specified by the FCC.

Part 13 of Chapter I of Title 47 of the Code of Federal Regulations is amended, as follows:

Part 13-Commercial Radio Operators

1. The authority citation for Part 13 continues to read as follows:

**AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303.**

2. Part 13 is revised to read as follows:

## PART 13-COMMERCIAL RADIO OPERATORS

### GENERAL


| | |
|---|---|
| § 13.1 | Basis and purpose. |
| § 13.3 | Definitions. |
| § 13.5 | Licensed commercial radio operators required. |
| § 13.7 | Classification of operator licenses and endorsements. |
| § 13.9 | Eligibility and application for new license or endorsement. |
| § 13.11 | Holding more that one commercial radio operator license. |
| § 13.13 | Application for renewed or modified license. |
| § 13.15 | License term. |
| § 13.17 | Replacement license. |
| § 13.19 | Operator's responsibility. |


### EXAMINATION SYSTEM


| | |
|---|---|
| § 13.201 | Qualifying for a commercial operator license or endorsement. |
| § 13.203 | Examination elements. |
| § 13.205 | Examination credit for licenses held. |
| § 13.207 | Preparing an examination. |
| § 13.209 | Examination procedures. |
| § 13.211 | Commercial radio operator license examination. |
| § 13.213 | COLEM qualifications. |
| § 13.215 | Question pools. |
| § 13.217 | Records. |


### GENERAL PROVISIONS

**§ 13.1 Basis and purpose.**

(a) Basis. The basis for the rules contained in this Part is the Communications Act of 1934, as amended, and applicable treaties and agreements to which the United States is a party.

(b) Purpose. The purpose of the rules in this Part is to prescribe the manner and conditions under which commercial radio operators are licensed by the Commission.

**§ 13.3 Definitions.**

The definitions of terms used in Part 13 are:

(a) *COLEM.* Commercial operator license examination manager.

(b) *Commercial radio operator.* A person holding a license or licenses specified in § 13.7(b).

(c) *GMDSS.* Global Maritime Distress and Safety System.

(d) *FCC.* Federal Communications Commission.

(e) *International Morse code.* A dot-dash code as defined in International Telegraph and Telephone Consultative Committee (CCITT) Recommendation F.1 (1984), Division B, I. Morse code.

(f) *ITU.* International Telecommunication Union.

(g) *PPC.* Proof-of-Passing Certificate.

(h) *Question pool.* All current examination questions for a designated written examination element.

(i) *Question set.* A series of examination questions on a given examination selected from the current question pool.

(j) *Radio Regulations.* The latest ITU *Radio Regulations* to which the United States is a party.

**§ 13.5 Licensed commercial radio operator required.**

Rules that require FCC station licensees to have certain transmitter operating, maintenance, and repair duties performed by a commercial radio operator are contained in Parts 23, 73, 74, 80, and 87 of this Chapter.

**§ 13.7 Classification of operator licenses and endorsements.**

(a) Commercial radio operator licenses issued by the FCC are classified in accordance with the Radio Regulations of the ITU.

(b) There are nine types of commercial radio operator licenses, certificates and permits (licenses). The license's ITU classification, if different from its name, is given in parenthesis.

(1) First Class Radiotelegraph Operator's Certificate.

(2) Second Class Radiotelegraph Operator's Certificate.

(3) Third Class Radiotelegraph Operator's Certificate (radiotelegraph operator's special certificate).

(4) General Radiotelephone Operator License (radiotelephone operator's general certificate).

(5) Marine Radio Operator Permit (radiotelephone operator's restricted certificate).

(6) Restricted Radiotelephone Operator Permit (radiotelephone operator's restricted certificate).

(7) Restricted Radiotelephone Operator Permit-Limited Use (radiotelephone operator's restricted certificate).

(8) GMDSS Radio Operator's License (general operator's certificate).

(9) GMDSS Radio Maintainer's License (technical portion of the first-class radio electronic certificate).

(c) There are six license endorsements affixed by the FCC to provide special authorizations or restrictions. Endorsements may be affixed to the license(s) indicated in parenthesis.

(1) Ship Radar Endorsement (First and Second Class Radiotelegraph Operator's Certificates, General Radiotelephone Operator License, GMDSS Radio Maintainer's License).

(2) Six Months Service Endorsement (First and Second Class Radiotelegraph Operator's License).

(3) Restrictive endorsements relating to physical handicaps, English language or literacy waivers, or other matters (all licenses).

(4) Marine Radio Operator Permits shall bear the following endorsement: This Permit does not authorize the operation of AM, FM or TV broadcast stations.

(5) General Radiotelephone Operator Licenses issued after December 31, 1985, shall bear the following endorsement: This license confers authority to operate licensed radio stations in the Aviation, Marine and International Fixed Public Radio Serviced only. This authority is subject to: any endorsement placed upon this license; FCC orders, rules, and regulations; United States statutes; and the provisions of any treaties to which the United States is a party. This license does not confer any authority to operate broadcast stations. It is not assignable or transferable.

(6) (i) If a person is afflicted with an uncorrected physical handicap which would clearly prevent the performance of all or any part of the duties of a radio operator, under the license for which application is made, at a station under emergency conditions involving the safety of life or property, that person still may be issued the license if found qualified. Such a license shall bear a restrictive endorsement as follows:

> This license is not valid for the performance of any operating duties, other than installation, service and maintenance duties, at any station licensed by the FCC which is required, directly or indirectly, by any treaty, statute or rule or regulation pursuant to statute, to be provided for safety purposes.

(ii) In the case of a license that does not require an examination in technical radio matters, the endorsement specified in (i) above will be modified by deleting the reference therein to installation, service, and maintenance duties.

(iii) In any case where an applicant who normally would receive or has received a commercial radio operator license bearing the endorsement prescribed by paragraph (i) above, indicates a desire to operate a station falling within the prohibited terms of the endorsement, the applicant may request in writing that such endorsement not be placed upon, or be removed from his or her license, and may submit written comments or statements from other parties in support thereof.

(iv) An applicant who shows that he has performed satisfactorily the duties of a radio operator at a station required to be provided for safety purposes during a period when he or she was afflicted by uncorrected physical handicaps of the same kind and to the same degree as the physical handicaps shown by his or her current application shall not be deemed to be within the provisions of paragraph (i) above.

(d) A Restricted Radiotelephone Operator Permit-Limited Use issued by the FCC to an aircraft pilot who is not legally eligible for employment in the United States is valid only for operating radio stations on aircraft.

(e) A Restricted Radiotelephone Operator Permit-Limited Use issued by the FCC to a person under the provision of § 303(1)(2) of the Communications Act of 1934, as amended, is valid only for the operation of radio stations for which that person is the station licensee.

**§ 13.9 Eligibility and application for new license or endorsement.**

(a) If found qualified, the following persons are eligible to apply for commercial radio operator licenses:

(1) Any person legally eligible for employment in the United States.

(2) Any person, for the purpose of operating aircraft radio stations, who holds:

(i) United States pilot certificates; or

(ii) Foreign aircraft pilot certificates which are valid in the United States, if the foreign government involved has entered into a reciprocal agreement under which such foreign government does not impose any similar requirement relating to eligibility for employment upon United States citizens.

(3) Any person who holds a FCC radio station license, for the purpose of operating that station.

(4) Notwithstanding any other provisions of the FCC's rules, no person shall be eligible to be issued a commercial radio operator license when

(i) the person's commercial radio operator license is suspended, or

(ii) the person's commercial radio operator license is the subject of an ongoing suspension proceeding, or

(iii) the person is afflicted with complete deafness or complete muteness or complete inability for any other reason to transmit correctly and to receive correctly by telephone spoken messages in English.

(b)

(1) Each application for a new General Radiotelephone Operator License, Marine Radio Operator Permit, First Class Radiotelegraph Operator's Certificate, Second Class Radiotelegraph Operator's Certificate, Third Class Radiotelegraph Operator's Certificate, Ship Radar Endorsement, Six Months Service Endorsement, GMDSS Radio Operator's License or GMDSS Radio Maintainer's License must be made on FCC Form 756.

(2) Each application for a Restricted Radiotelephone Operator Permit must be made on FCC Form 753.

(3) Each application for a Restricted Radiotelephone Operator Permit-Limited Use must be made on FCC Form 755.

(c) Each application for a new General Radiotelephone Operator License, Marine Radio Operator Permit, First Class Radiotelegraph Operator's Certificate, Second Class Radiotelegraph Operator's Certificate, Third Class Radiotelegraph Operator's Certificate, Ship Radar Endorsement, GMDSS Radio Operator's License or GMDSS Radio Maintainer's License must include an original PPC(s) from a COLEM(s) showing that the applicant has passed the necessary examination element(s). The applicant must submit the application to the address specified in the Part 1 of the rules.

(d) Each application for a new six month radiotelegraph endorsement must include documentation showing that the applicant has satisfied the requirements of Section 13.201(c). The applicant must submit the application to the address specified in the Part 1 of the rules.

(e) No person shall alter, duplicate for fraudulent purposes, or fraudulently obtain or attempt to obtain an operator license. No person shall use a license issued to another or a license that he or she knows to be altered, duplicated for fraudulent purposes, or fraudulently obtained. No person shall obtain or attempt to obtain, or assist another person to obtain or attempt to obtain, an operator license by fraudulent means.

**§ 13.11 Holding more than one commercial radio operator license.**

(a) An eligible person may hold more than one commercial operator license except as follows:

(1) No person may hold two or more unexpired radiotelegraph operator's certificates at the same time;

(2) No person may hold any class of radiotelegraph operator's certificate and a Marine Radio Operator Permit;

(3) No person may hold any class of radiotelegraph operator's certificate and a Restricted Radiotelephone Operator Permit.

(b) Each person who is not legally eligible for employment in the United States, and certain other persons who were issued permits prior to September 13, 1982, may hold two Restricted Radiotelephone Operator Permits simultaneously when each permit authorizes the operation of a particular station or class of stations.

**§ 13.13 Application for a renewed or modified license.**

(a) Each application to renew a First Class Radiotelegraph Operator's Certificate, Second Class Radiotelegraph Operator's Certificate, Third Class Radiotelegraph Operator's Certificate, GMDSS Radio Operator's License, or GMDSS Radio Maintainer's License must be made on FCC Form 756. The application must be accompanied by the original document or a legible photocopy unless it has been lost, mutilated, or destroyed. If the license has been lost, mutilated, or destroyed, submit a written explanation. The application must be accompanied by the appropriate fee and submitted to the address specified in Part 1 of the rules.

(b) A licensee may submit an application for renewal of an unexpired license during the last year of the license term. If a license expires, application for renewal may be made during a grace period of five years after the expiration date without having to retake the required examinations. The application must be accompanied by the required fee and submitted to the address specified in Part 1 of the rules. During the grace period, the expired license is not valid. A license renewed during the grace period will be effective as of the date of the renewal. Licensees who fail to renew their license within the grace period must apply for a new license and take the required examination(s).

(c) Each application involving a change in operator class must be made on FCC Form 756. Each application for a commercial operator license involving a change in operator class must include original PPC(s) from a COLEM showing that the applicant has passed the necessary examination element(s). The application must be accompanied by the required fee, if any, and submitted to the address specified in Part 1 of the rules.

(d) The holder of a First Class Radiotelegraph Operator's Certificate, Second Class Radiotelegraph Operator's Certificate, Third Class Radiotelegraph Operator's Certificate, General Radiotelephone Operator License, GMDSS Radio Operator's License, or GMDSS Radio Maintainer's License whose name is legally changed may obtain a modified license by filing a FCC Form 756 with a written explanation. The application must be accompanied by the required fee and submitted to the address specified in Part 1 of the rules.

(e) A licensee who has made application for a renewed or modified operator license or permit may exhibit a photocopy of their license in lieu of the original document.

**§ 13.15 License Term.**

(a) Commercial radio operator licenses are normally valid for a term of five years from the date of issuance, except as provided in paragraph (b) of this section.

(b) General Radiotelephone Operator Licenses, Restricted Radiotelephone Operator Permits, and Restricted Radiotelephone Operator Permits-Limited Use are normally valid for the lifetime of the holder. The terms of all Restricted Radiotelephone Operator Permits issued prior to November 15, 1953, and valid on that date, are extended to the lifetime of the operator.

**§ 13.17 Replacement license.**

(a) Each licensee or permittee whose original document is lost, mutilated, or destroyed must request a replacement. The application must be accompanied by the required fee and submitted to the address specified in Part 1 of the rules.

(b) Each application for a replacement General Radiotelephone Operator License, Marine Radio Operator Permit, First Class Radiotelegraph Operator's Certificate, Second Class Radiotelegraph Operator's Certificate, Third Class Radiotelegraph Operator's Certificate, GMDSS Radio Operator's License, GMDSS Radio Maintainer's License, must be made on FCC Form 756 and must include a written explanation as to the circumstances involved in the loss, mutilation, or destruction of the original document.

(c) Each application for a replacement Restricted Radiotelephone Operator Permit must be on FCC Form 753.

(d) Each application for a replacement Restricted Radiotelephone Operator Permit-Limited Use must be on FCC Form 755.

(e) A licensee who has made application for a replacement license may exhibit a copy of the application submitted to the FCC or a photocopy of the license in lieu of the original document.

**§ 13.19 Operator's responsibility.**

(a) The operator responsible for maintenance of a transmitter may permit other persons to adjust that transmitter in the operator's presence for the purpose of carrying out tests or making adjustments requiring specialized knowledge or skill, provided that he or she shall not be relieved thereby from responsibility for the proper operation of the equipment.

(b) In every case where a station operating log or service and maintenance log is required, the operator responsible for the station operation or maintenance shall make the required entries in the station log. If no station log is required, the operator responsible for service or maintenance duties which may affect the proper operation of the station shall sign and date an entry in the station maintenance records giving:

(1) Pertinent details of all service and maintenance work performed by the operator or conducted under his or her supervision;

(2) His or her name and address; and

(3) The class, serial number and expiration date of the license:

(c) When the operator is on duty and in charge of transmitting systems, or performing service, maintenance or inspection functions, the license or permit document, or a photocopy thereof, must be posted or in the operator's personal possession, and available for inspection upon request by a FCC representative.

(d) The operator on duty and in charge of transmitting systems, or performing service, maintenance or inspection functions, shall not be subject to the requirements of paragraph (b) of this section at a station, or stations of one licensee at a single location, at which the operator is regularly employed and at which his or her license, or a photocopy, is posted.

**EXAMINATION SYSTEM**

**§ 13.201 Qualifying for a commercial operator license or endorsement.**

(a) To be qualified to hold any commercial radio operator license, an applicant must have a satisfactory knowledge of FCC rules and must have the ability to send correctly and receive correctly spoken messages in the English language.

(b) An applicant must pass an examination for the issuance of a new commercial radio operator license, other than the Restricted Radiotelephone Operator Permit and the Restricted Radiotelephone Operator Permit-Limited Use, and for each change in operator class. An applicant must pass an examination for the issuance of a new Ship Radar Endorsement. Each applicant for the class of license or endorsement specified below must pass, or otherwise receive credit for, the corresponding examination elements:

(1) First Class Radiotelegraph Operator's Certificate.

(i) Telegraphy Elements 3 and 4;

(ii) Written Elements 1, 5, and 6;

(iii) Applicant must be at least 21 years old;

(iv) Applicant must have one year of experience in sending and receiving public correspondence by radiotelegraph at a public coast station, a ship station, or both.

(2) Second Class Radiotelegraph Operator's Certificate.

(i) Telegraphy Elements 1 and 2;

(ii) Written Elements 1, 5, and 6.

(3) Third Class Radiotelegraph Operator's Certificate.

(i) Telegraphy Elements 1 and 2;

(ii) Written Elements 1 and 5.

(4) General Radiotelephone Operator License: Written Elements 1 and 3.

(5) Marine Radio Operator Permit: Written Element 1.

(6) GMDSS Radio Operator's License: Written Elements 1 and 7.

(7) GMDSS Radio Maintainer's License: Written Elements 1, 3, and 9.

(8) Ship Radar Endorsement: Written Element 8.

(c) An applicant for the six months service endorsement must show that:

(1) The applicant was employed as a radio operator on board a ship or ships of the United States for a period totaling at least six months;

(2) The ships were equipped with a radio station complying with the provisions of Part II of Title III of the Communications Act, or the ships were owned and operated by the U.S. Government and equipped with radio stations;

(3) The ships were in service during the applicable six month period and no portion of any single in-port period included in the qualifying six months period exceeded seven days;

(4) The applicant held a FCC-issued First or Second Class Radiotelegraph Operator's Certificate during this entire six month qualifying period; and

(5) The applicant holds a radio officer's license issued by the U.S. Coast Guard at the time the six month endorsement is requested.

**§ 13.203 Examination elements.**

(a) A written examination (written Element) must prove that the examinee possesses the operational and technical qualifications to perform the duties required by a person holding that class of commercial radio operator license. Each written examination must be comprised of a question set as follows:

(1) Element 1 (formerly Elements 1 and 2): Basic radio law and operating practice with which every maritime radio operator should be familiar. 24 questions concerning provisions of laws, treaties, regulations, and operating procedures and practices generally followed or required in communicating by means of radiotelephone stations. The minimum passing score is 18 questions answered correctly.

(2) Element 3: General radiotelephone. 76 questions concerning electronic fundamentals and techniques required to adjust, repair, and maintain radio transmitters and receivers at stations licensed by the FCC in the aviation, maritime, and international fixed public radio services. The minimum passing score is 57 questions answered correctly.

(3) Element 5: Radiotelegraph operating practice. 50 questions concerning radio operating procedures and practices generally followed or required in communicating by means of radiotelegraph stations primarily other than in the maritime mobile services of public correspondence. The minimum passing score is 38 questions answered correctly.

(4) Element 6: Advanced radiotelegraph. 100 questions concerning technical, legal and other matters applicable to the operation of all classes of radiotelegraph stations, including operating procedures and practices in the maritime mobile services of public correspondence, and associated matters such as radio navigational aids, message traffic routing and accounting, etc. The minimum passing score is 75 questions answered correctly.

(5) Element 7: GMDSS radio operating practices. 76 questions concerning GMDSS radio operating procedures and practices sufficient to show detailed practical knowledge of the operation of all GMDSS sub-systems and equipment; ability to send and receive correctly by radio telephone and narrow-band direct-printing telegraphy; detailed knowledge of the regulations applying to radio communications, knowledge of the documents relating to charges for radio communications and knowledge of those provisions of the International Convention for the Safety of Life at Sea which relate to radio; sufficient knowledge of English to be able to express oneself satisfactorily both orally and in writing; knowledge of and ability to perform each function listed in Section 80.1081; and knowledge covering the requirements set forth in IMO Assembly Resolution on Training for Radio Personnel (GMDSS), Annex 3. The minimum passing score is 57 questions answered correctly.

(6) Element 8: Ship radar techniques. 50 questions concerning specialized theory and practice applicable to the proper installation, servicing and maintenance of ship radar equipment in general use for marine navigational purposes. The minimum passing score is 38 questions answered correctly.

(7) Element 9: GMDSS radio maintenance practices and procedures. 50 questions concerning the requirements set forth in IMO Assembly on Training for Radio Personnel (GMDSS), Annex 5 and IMO Assembly on Radio Maintenance Guidelines for the Global Maritime Distress and Safety System related to Sea Areas A3 and A4. The minimum passing score is 38 questions answered correctly.

(b) A telegraphy examination (telegraphy Elements) must prove that the examinee has the ability to send correctly by hand and to receive correctly by ear texts in the international Morse code at not less than the prescribed speed, using all the letters of the alphabet, numerals 00-9, period, comma, question mark, slant mark, and prosigns *AR*, *BT*, and *SK*.

(1) Telegraphy Element 1: 16 code groups per minute.

(2) Telegraphy Element 2: 20 words per minute.

(3) Telegraphy Element 3: 20 code groups per minute.

(4) Telegraphy Element 4: 25 words per minute.

**§ 13.205 Examination credit for licenses held.**

(a) The COLEM must give credit as specified below to an examinee holding any of the following documents:

(1) An unexpired (or within the grace period) FCC-issued commercial radio operator license: the written examination and telegraphy Element(s) required to obtain the license held.

(2) A PPC: Each element the PPC indicates the examinee passed within the previous 365 days.

(3) An unexpired or within the grace period FCC-issued Amateur Extra Class operator license: Telegraphy Elements 1 and 2.

(b) No examination credit, except as herein provided, shall be allowed on the basis of holding or having held any other license, permit, or certificate.

**§ 13.207 Preparing an examination.**

(a) Each telegraphy message and each written question set administered to an examinee for a commercial radio operator license must be provided by a COLEM.

(b) Each question set administered to an examinee must utilize questions taken from the applicable Element question pool. The COLEM may obtain the written question sets from a supplier or other COLEM.

(c) A telegraphy examination must consist of a plain language text or code group message sent in the international Morse code at no less than the prescribed speed for a minimum of five minutes. The message must contain each required telegraphy character at least once. No message known to the examinee may be administered in a telegraphy examination. Each five letters of the alphabet must be counted as one word or one code group. Each numeral, punctuation mark, and prosign must be counted as two letters of the alphabet. The COLEM may obtain the telegraphy message from a supplier or other COLEM.

**§ 13.209 Examination procedures.**

(a) Each examination for a commercial radio operator license must be administered at a location and a time specified by the COLEM. The COLEM is responsible for the proper conduct and necessary supervision of each examination. The COLEM must immediately terminate the examination upon failure of the examinee to comply with its instructions.

(b) Each examinee, when taking an examination for a commercial radio operator license, shall comply with the instructions of the COLEM.

(c) No examination that has been compromised shall be administered to any examinee. Neither the same telegraphy message nor the same question set may be re-administered to the same examinee.

(d) Passing a telegraphy examination.

(1) To pass a receiving telegraphy examination, an examinee is required to receive correctly the message by ear, for a period of 1 minute without error at the rate of speed specified in Section 13.203 for the class of license sought.

(2) To pass a sending telegraphy examination, an examinee is required to send correctly for a period of 1 minute at the rate of speed prescribed in Section 13.203(b) for the class of license sought.

(e) Passing a telegraphy receiving examination is adequate proof of an examinee's ability to both send and receive telegraphy. The COLEM, however, may also include a sending segment in a telegraphy examination.

(f) The COLEM is responsible for determining the correctness of the examinee's answers. When the examinee does not score a passing grade on an examination element, the COLEM must inform the examinee of the grade.

(g) When the examinee is credited for all examination elements required for the commercial operator license sought, the examinee may apply to the FCC for the license.

(h) No applicant who is eligible to apply for any commercial radio operator license shall, by reason of any physical handicap, be denied the privilege of applying and being permitted to attempt to prove his or her qualifications (by examination if examination is required) for such commercial radio operator license in accordance with procedures established by the COLEM.

(i) The COLEM must accommodate an examinee whose physical disabilities require a special examination procedure. The COLEM may require a physician's certification indicating the nature of the disability before determining which, if any, special procedures are appropriate to use. In the case of a blind examinee, the examination questions may be read aloud and the examinee may answer orally. A blind examinee wishing to use this procedure must make arrangements with the COLEM prior to the date the examination is desired.

(j) The FCC may:

(1) Administer any examination element itself.

(2) Readminister any examination element previously administered by a COLEM, either itself or by designating another COLEM to readminister the examination element.

(3) Cancel the commercial operator license(s) of any licensee who fails to appear for re-administration of an examination when directed by the FCC, or who fails any required element that is re-administered. In case of such cancellation, the person will be issued an operator license consistent with completed examination elements that have not been invalidated by not appearing for, or by failing, the examination upon re-administration.

**§ 13.211 Commercial radio operator license examination.**

(a) Each session where an examination for a commercial radio operator license is administered must be managed by a COLEM or the FCC.

(b) Each examination for a commercial radio operator license must be administered as determined by the COLEM.

(c) The COLEM may limit the number of candidates at any examination.

(d) The COLEM may prohibit from the examination area items the COLEM determines could compromise the integrity of an examination or distract examinees.

(e) Within 10 days of completion of the examination element(s), the COLEM must provide the results of the examination to the examinee and the COLEM must issue a PPC to an examinee who scores a passing grade on an examination element.

(f) A PPC is valid for 365 days from the date it is issued.

**§ 13.213 COLEM qualifications.**

No entity may serve as a COLEM unless it has entered into a written agreement with the FCC. In order to be eligible to be a COLEM, the entity must:

(a) Agree to abide by the terms of the agreement;

(b) Be capable of serving as a COLEM;

(c) Agree to coordinate examinations for one or more types of commercial radio operator licenses and/or endorsements;

(d) Agree to assure that, for any examination, every examinee eligible under these rules is registered without regard to race, sex, religion, national origin or membership (or lack thereof) in any organization;

(e) Agree to make any examination records available to the FCC, upon request.

(f) Agree not to administer an examination to an employee, relative, or relative of an employee.

**§ 13.215 Question pools.**

The question pool for each written examination element will be composed of questions acceptable to the FCC. Each question pool must contain at least 5 times the number of questions required for a single examination. The FCC will

issue public announcements detailing the questions in the pool for each element. COLEMs must use only the most recent question pool made available to the public when preparing a question set for a written examination element.

**§ 13.217 Records.**

Each COLEM recovering fees from examinees must maintain records of expenses and revenues, frequency of examinations administered, and examination pass rates. Records must cover the period from January 1 to December 31 of the preceding year and must be submitted as directed by the Commission. Each COLEM must retain records for 1 year and the records must be made available to the FCC upon request.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 85-166**
**Phase I**

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

**TENTATIVE DECISION**

**Adopted: November 3, 1992; Released: February 16, 1993**

By the Commission:

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## I. INTRODUCTION

1. This proceeding addresses whether the Shared Network Facilities Arrangements (SNFAs) between the Bell Operating Companies (BOCs) and the American Telephone and Telegraph Company (AT&T) have been unreasonably discriminatory in light of the special access tariff offerings of the BOCs to AT&T and other interexchange carriers (IXCs) and access customers. The case is on remand from the Court of Appeals for the D.C. Circuit. MCI Telecommunications Corp. v. FCC, 842 F.2d 1296 (D.C. Cir. 1988) (*SNFA Remand Order*).

2. Based upon our review of the record developed on remand, including an analysis of the SNFA contracts and special access tariffs, we reach conclusions concerning the standard to be applied to determine which SNFAs are "like" special access for purposes of the Communications Act. We reach tentative conclusions regarding the number of "like" SNFAs under this standard, the extent of the disparity in charges between SNFAs and special access, and the extent to which this disparity has been just and reasonable when weighed against factors justifying the offering of SNFAs only to AT&T. The Order establishes a schedule for supplemental filings to submit additional evidence and analysis relevant to the validity of these tentative conclusions.

## II. BACKGROUND

3. The consent decree in the AT&T antitrust case (Modification of Final Judgement or MFJ) required a reorganization of the then existing Bell System entities in order to create a new AT&T that would provide "interexchange" communications and BOCs that would provide "exchange" or "exchange access" services.[1] The decree required AT&T to develop a Plan of Reorganization (POR) to accomplish that purpose and to submit the POR to the decree court for approval.

4. The POR, which was approved by that Court, assigned Bell System property that was used exclusively for Bell System "interexchange" or "interLATA" services to AT&T and assigned property that was used exclusively for "exchange and exchange access" or "intraLATA" services to the BOCs. Approximately 20 percent of the Bell System assets were used to provide both interLATA and intraLATA service and did not fit easily into this arrangement. Section I.A.2 of the MFJ prohibited joint ownership of facilities by AT&T and the BOCs, but permitted "sharing, through leasing or otherwise, of multifunction facilities so long as the separated portion of each BOC is insured control over the exchange telecommunications and exchange access functions..." The POR implemented that provision by assigning title to multifunction assets on the basis of predominant interLATA or intraLATA use and granting the other entity the right to lease a portion of the facility. AT&T and the BOCs entered into thousands of contracts known as Shared Network Facility Arrangements or SNFAs for the lease of multifunction equipment, facilities, property and other assets.

5. Shortly after the MFJ was adopted the Commission adopted access charge rules that required all local exchange carriers (LECs) including the BOCs to provide access services to IXCs, including AT&T, through tariffed charges that are computed in accordance with the access charge rules.[2]

6. The divestiture occurred on January 1, 1984, and the SNFAs became effective at that time. The initial access charge tariffs were originally scheduled to become effective at the same time, but a series of suspensions or rejections[3] delayed the effectiveness of the initial access tariffs. Tariffs for most access elements became effective in May 1984, but the special access tariffs did not become effective until April 1985.

7. Commission Orders in the investigation of initial access charges concluded that some special access issues required further investigation.[4] The Common Carrier Bureau (the Bureau) issued an order designating the issues for that investigation (CC Docket No. 85-166) on May 24, 1985.[5] Paragraph 9 of the *Designation Order* noted that MCI had argued that "special access tariffs discriminate against IXCs who cannot take similar service" at the SNFA rates and directed the BOCs to "explain and justify the basis for the difference between charges under SNFAs and special access charges."

8. In an Order released January 24, 1986, the Commission concluded "that SNFAs are reasonable under the Communications Act because they further the public interest.[6] The Commission reasoned that, even assuming *arguendo* that SNFAs and special access are "like" services for purposes of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), any difference in charges was justifiable under the unique practical difficulties presented by divestiture.[7]

9. On appeal, the Court remanded the *SNFA Order* for further consideration, rejecting "as inadequate the FCC's explanation for its conclusion that the special access tariffs are not unreasonably discriminatory when set beside the SNFA charges." *SNFA Remand Order*, 842 F.2d at 1303. The Court mandated a three-stage inquiry to ascertain whether unreasonable discrimination exists:

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[1] *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[2] The access charge rules describe access service as the origination or termination of interexchange telecommunications and establish several access elements including a special access element that encompasses WATS and 800 service access lines and the access portion of private lines. The access charge rules were codified as Part 69 of Title 47 of the Code of Federal Regulations.

[3] Investigation of Access and Divestiture Related tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part I, FCC 85-70 (released Feb. 19, 1985) (*February 19 Order*); Investigation of Access and Divestiture Related tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part I, FCC 85-100 (released Mar. 8, 1985) (*March 8 Order*).

[4] *February 19 Order, id.*; *March 8 Order, id.*

[5] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 7426 (released May 24, 1985) (*Designation Order*).

[6] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, released Jan. 24, 1986 (*SNFA Order*) at para. 54.

[7] *Id.* at paras. 54-55.

> First, the FCC must determine, generally, whether some or all facilities available to AT&T under the SNFAs are "like" facilities that are used to provide special access services. Where the facilities are alike, the FCC must devise some reasonable mechanism to assess amounts paid under the two pricing schemes to determine whether some tariffs are discriminatory by comparison with their SNFA counterparts. Finally, if discrimination exists, the FCC must decide whether it is just and reasonable.

*SNFA Remand Order*, 842 F.2d at 1307. The Court noted that, in order to perform this analysis, the Commission must obtain copies of the SNFAs, or a reasonable sampling of them, and lists of charges paid by AT&T pursuant to the agreements. The Court left to the Commission the task of "devis[ing] an appropriate investigation to ensure that IXCs other than AT&T are not being forced to pay unjustly or unreasonably discriminatory rates." *Id.*

**A. Proceedings on Remand**

10. In response to the Court's remand, the Bureau directed the filing of all SNFAs -- both those that pertain to lease of facilities from the BOCS to AT&T (BOC SNFAs) and those that pertain to lease of facilities from AT&T to the BOCs (AT&T SNFAs).[8] The Bureau also directed AT&T and the BOCs to file supplements to their direct cases in this investigation at the same time that the BOCs filed the SNFAs, addressing in particular the Court's three-stage analysis.[9]

11. The BOCs and AT&T filed copies of the SNFAs and Supplemental Direct Cases on June 13, 1989. Following the Bureau's grant of a request by MCI for an extension of time, plus a further extension on the Bureau's own motion,[10] oppositions were filed by MCI, Sprint, and Competitive Telecommunications Association (CompTel), a trade association of IXCs. The BOCs and AT&T filed replies to the oppositions.

12. On January 12, 1990, MCI filed a motion for leave to file supplemental pleading, accompanied by a supplemental reply to the BOCs and AT&T. The Bureau accepted corrections to MCI's computed rate comparisons, but otherwise denied the motion and dismissed the supplemental reply. Upon further review, however, it is apparent that the BOC and AT&T replies present a substantial amount of new data and information relevant to the comparison of SNFA and special access functions and rates, and relevant to MCI's exhibits and rate comparisons. In the interest of compiling a balanced record, especially in view of the fact that much of the information in the BOC and AT&T replies could have been presented in the supplemental direct cases, we have decided to accept and consider MCI's supplemental reply.

**B. Complaint Proceedings**

13. While this investigation was pending, MCI filed complaints against the BOCs based on the same facts. MCI Telecommunications Corporation v. Bell Telephone Co. of Pennsylvania, *et al.*, File Nos. E-89-88 through E-89-110, 4 FCC Rcd 3735 (Com.Car.Bur. 1989). In the course of those complaint proceedings, the parties conducted extensive discovery, including interrogatories and depositions. The Bureau allowed evidence gathered in the course of the complaint proceedings to be admitted in this investigation. MCI Telecommunications Corporation v. Bell Telephone Co. of Pennsylvania, *et al.*, File Nos. E-89-88 through E-89-110, 4 FCC Rcd 6767, 6768 (Com.Car.Bur. 1989). Those complaint proceedings have been stayed pending the outcome of this investigation.[11]

14. Several BOCs object to the use of the material gathered in the complaint proceeding in this investigation. US West contends that it is improper to "commingle" evidence from parallel investigations and complaint proceedings. US West Reply at 8-10. The information gathered during the complaint proceeding is clearly relevant to the resolution of the issues in this investigation and we believe that including this information in this record will best serve the interests of justice and the purposes of this proceeding. Section 4(i) of the Communications Act, 47 U.S.C. § 154(i); and Section 1.1 of the Commission's Rules, 47 C.F.R. § 1.1.

## III. THE SNFA CONTRACTS

15. The SNFA leases filed by the BOCs and AT&T comprise a total of 321 binders and approximately 165,000 pages. The terms and conditions for leases are in the Master Shared Network Facilities Agreement (Master SNFA), an 856-page document supplemented by a 222-page Standard Costing Manual (the Costing Manual). The Master SNFA is divided into eight Articles, described more fully in footnote 16 of this Order, *infra*. The individual SNFA leases describe the facility, the contracted level of capacity, the scheduled termination date, and in some cases, a description of any other facilities interconnected with the leased facility. AT&T and the BOCs also submitted detailed billing information for each SNFA schedule, and aggregated billing summaries by article and state. The lease itself is a standardized form contained in the Master SNFA. *See* Master SNFA, Sections 3.B.14; 4.A.23. AT&T and the BOCs have submitted roughly 9500 SNFAs in which the BOCs are leaseholders, and roughly 12,500 SNFAs in which AT&T is the leaseholder.

16. The SNFAs were given specified termination dates, ranging from five years for most Articles 3 and 4 transmission facilities to 10 years for Article 6 land and buildings. Master SNFA, Article 1.A.06. These specified termination dates were subject to renewal periods of up to

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[8] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, 4 FCC Rcd 687 (Com.Car.Bur. 1989) (*SNFA Filing Requirements Order*).

[9] *Id.* at 688.

[10] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, 4 FCC Rcd 6766 (Com.Car.Bur.1989), 4 FCC Rcd 6837 (Com.Car.Bur. 1989).

[11] MCI Telecommunications Corp. v. Bell Telephone Co. of Pennsylvania, *et al.*, File Nos. 89-88 through 89-110, 4 FCC Rcd 8227 (Com.Car.Bur. 1989). Rochester Telephone Corporation (Rochester) has filed complaints parallel to MCI's SNFA complaints. Rochester Telephone Corp. v. Bell Telephone Co. of Pennsylvania, *et al.*, File Nos. E-89-318 through E-89-339. Rochester submitted a letter to the Enforcement Division of the Common Carrier Bureau on January 8, 1990, requesting that its complaints also be stayed pending the outcome of this investigation. The Competitive Telecommunications Association (CompTel) has filed a petition requesting that the statute of limitations be tolled while the complaint proceeding is in effect.

three years for Article 3 and 4 facilities. *Id.* at Article 1.A.07. All transmission SNFAs would thus be terminated no later than December 31, 1991. In addition, the non-owner of the facility had the option of terminating the SNFA prior to the scheduled termination date upon six months' notice and the payment of a fee. *Id.* at Article 1.A.10.

17. For the majority of BOC SNFAs, AT&T exercised its right to early termination. AT&T states that approximately 7000 of the SNFA schedules under which it obtained facilities from the BOCs (*i.e.*, 65 percent of the total) had been terminated by May 1989. AT&T Supp. Direct Case, Deposition of V. Tart. The BOCs report similar figures at the time of their Supplemental Direct Cases. Southwestern Bell reports that of 1433 SNFA facilities leased to AT&T, 1049 SNFAs leases, or 73 percent, were no longer in effect. Southwestern Bell Reply at 19. BellSouth notes that 807 of 2123 SNFAs, or 38 percent, were not in effect.[12] Other BOCs report similar results: Ameritech, 80 percent have been terminated, Ameritech Reply at 43; Bell Atlantic, 2914 of 2977, or 98 percent, Bell Atlantic Reply at 29; NYNEX, 2687 of 2731, or 98 percent. NYNEX Reply at 43.[13]

## IV. THE REMAND ISSUES

### A. Issue One: Whether Some SNFA Facilities Are "Like" Special Access

#### 1. The Functional Equivalence Test for "Likeness"

18. Section 202(a) of the Act generally proscribes unreasonable discrimination in connection with all like communications services.[14] All parties agree that the appropriate legal test for determining "like" services is the "functional equivalence" test, which questions whether allegedly "like" services are different in any material functional respect. The parties differ significantly, however, in their characterization and application of this test to SNFAs and special access. *See, e.g.*, Ameritech Supp. Direct Case at 20-21; BellSouth Supp. Direct Case at 12; PacTel Supp. Direct Case at 16; MCI Opposition at 12-13.

19. "Likeness" has been addressed by this Commission and the courts in several prior cases.[15] Under these cases, the test of whether services are "like" is functional similarity or equivalence. This test looks to the nature of the service. The inquiry is whether the services "are different in any material functional respect." *ABC*, 663 F.2d at 138. For example, two AT&T Telpak offerings were found to be "like" private line service furnished as individual voice grade channels where customers were given the lower Telpak rates "with no change whatever in the facilities they were being furnished." *American Trucking*, 377 F.2d at 128. Full-time and part-time video services were similarly held to be "like" where users received the identical transmission service, with cost the only reason some major customers preferred full-time service; the fact that each service category had its own "dedicated" facilities was found to be irrelevant to the issue of whether the services were "like." *ABC*, 663 F.2d at 139 n.13. Similarly, voice grade circuits provided to domestic carriers by tariff were held to be "like" circuits of similar physical and functional characteristics provided to international record carriers (IRCs) at lower, contract rates where the only differences claimed by the IRCs "rested on the facile and conclusory observation that the IRC interconnections were 'part' of the international system, and thus 'unique.'" *Western Union*, 568 F.2d at 1018.

20. In evaluating whether services serve different functions, the Commission also considers the issue from the perspective of customers. Indeed, the D.C. Circuit has described customer perception as "a critical concept" and a "linchpin" of functional equivalency. *Ad Hoc*, 680 F.2d at 796. In *Ad Hoc*, the Court reversed a Commission finding that MTS and WATS were "like" services, because the Commission was judged not to have explained its finding adequately, in particular, the "critical concept it claim[ed] to employ - customer perception of functional equivalency..." *Id.* at 798. The Court left to the Commission "the task of identifying the proper method for applying this critical concept." *Id.* at 796 n.13. The opinion noted, however, that "cross-elasticity of demand may be a standard means for evaluating customer perception." *Id.* In the court's view:

> The focus of the test should be practical, oriented to customers: what function or need do customers perceive to be satisfied by the services under examination? If customers perceive that two services perform the same function, price will govern choice. Sensibly, the functional equivalency test should be allowed to yield a determination that these services are "like," whether or not they are "identical," and we so hold.

*Id.* at 797.[16]

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[12] Table taken from SNFAs submitted by BellSouth on June 13, 1989, Volume 26 of 26, at pages 13,111 through 13,114.

[13] Ameritech, Bell Atlantic, and NYNEX report figures only for their Article 3 and Article 4 SNFAs.

[14] Section 202(a) of the Act provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with *like communications service*, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage. (Emphasis added.)

[15] Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 795-96 (D.C. Cir. 1980) (*Ad Hoc*); Western Union v. FCC, 568 F.2d 1012, 1018 (2d Cir. 1977), cert. denied, 436 U.S. 944 (1978) (*Western Union*); American Broadcasting Co. v. FCC, 663 F.2d 133 (D.C. Cir. 1980) (*ABC*)).and American Trucking Ass'ns v. FCC, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967) (*American Trucking*). *See also* American Tel. & Tel. Co. (Hi/Lo), 55 FCC 2d 224, 230 (1975), *aff'd mem. sub nom.* Commodity News Services, Inc. v. FCC, 561 F.2d 1021 (D.C. Cir. 1977) and MCI Communications Corp. v. FCC, No. 89-1382 (D.C. Cir. Oct. 23, 1990).

[16] The majority in *Ad Hoc* expressly rejected an apparently narrower test for "like" services and functional equivalence expressed in a concurring opinion *per* Judge MacKinnon.

21. MCI argues that the Commission and the Courts have focused on two critical considerations in determining functional equivalence: 1) the similarity of transmission technologies, *see, e.g., Western Union*, 568 F. 2d at 1018; and 2) the extent to which "cost considerations [are] the sole determining criterion" in choosing between the services, *ABC, Ad Hoc*. In the case of SNFAs and special access, MCI contends, the transmission technologies are identical, and AT&T perceived the services to be functionally equivalent and chose between them on the basis of cost. It contends that AT&T and the BOCs have not identified any material differences between them. MCI Opposition at 13-14, Supplemental Opposition at 10-12. MCI claims, for example, that some facilities are used to provide SNFAs and special access simultaneously. It cites AT&T documents in which AT&T allegedly discussed only cost as a consideration in choosing between SNFAs and special access, or in choosing the time at which to abandon SNFAs.

22. The BOCs generally agree that special access and SNFAs share the same transmission technologies but argue that this is not dispositive. They contend that differences in the facilities, technologies, operational restrictions, service characteristics, limitations on location and use, and other factors must also be examined, citing the concurring opinion in *Ad Hoc* and discussion in the *Tariff 12 Order*.[17]

**2. Functions of Special Access and SNFAs; Analysis of Asserted Differences**

23. There is little or no dispute that many types of SNFAs are not equivalent to special access in any functional sense. Special access provides transmission capability and associated features and functions. It does not provide any equivalent to most of the categories of SNFA contracts, as these are described in the various Articles in the Master SNFA.[18] We accordingly find that Article 2, 5, 6, 7, and 8 SNFAs are not "like" special access.

24. The focus of our initial investigation and of the current cycle of pleadings is upon the Article 3 and 4 SNFAs, which do provide, or at least are associated with, transmission capability. *See* Attachment B of this Order. Article 3 SNFAs are leases of various types of multifunction cables, including metallic cable pairs, coaxial cable, and optical fiber. Also covered are equipment and facilities used in the transmission of signals over such cable facilities (*e.g.*, carrier on cable, multiplexing equipment, and equipment used to regenerate or amplify the transmitted signal) and various facilities used in association with the cables themselves, including telephone poles, underground conduit, and towers. Article 4 SNFAs cover central office circuit equipment and carrier systems (Article 4A),[19] in addition to microwave radio transmission facilities (Article 4B).[20]

25. These Article 3 and 4 SNFAs were limited both in location and time. As with other SNFAs, only multifunction facilities in place, under construction, or planned as of January 1, 1984, were available to AT&T, and leases under Articles 3 and 4 were limited to a five-year term and a single, optional three-year extension. They clearly do, however, provide transmission paths, and not simply the lease of individual facilities and components. Section 3.A.02 of the Master SNFA describes the undertaking of the contracting parties in these terms:

> When the Facilities required to provide point-to-point transmission capability are wholly owned by one party or obtained by that party under other provisions of this Agreement, that party may provide for the point-to-point transmission needs of the other party using such Facilities on a point-to-point network capacity basis.

Thus, where the BOCs were assigned ownership of multifunction interexchange transmission facilities under the POR, Article 3 and 4 SNFA leases were made available to AT&T as a means of meeting its needs for point-to-point transmission.

26. This basic functional commonality between special access and Article 3 and 4 SNFAs -- the fact that both provide point-to-point transmission paths -- is the cornerstone of MCI's argument that the two are "like":

> The essence of special access is the provision of transmission capability -- which may be used by the buyer for many different purposes -- between designated locations, at a rate based upon the amount of service ordered. SNFAs provide precisely this

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[17] AT&T Communications, CC Docket No. 87-568, 4 FCC Rcd 4932, 4936 (1989) (*Tariff 12 Order*), *recon. denied* 4 FCC Rcd 7928 (1989), *remanded sub nom.* MCI Telecommunications Corp. v. FCC, 917 F.2d 30 (D.C. Cir. 1990), *Order on Remand* 6 FCC Rcd 7039 (1991), *petitions for review pending sub nom.* Competitive Telecommunications Ass'n v. FCC, No. 92-1013, (D.C. Cir., filed Jan.17, 1992).

[18] Article 1 of the Master SNFA sets out definitions, terms, and conditions applicable to SNFAs in general. Article 2 SNFAs are leases for switching systems and electrical power used for equipment. Article 5 includes facilities, centers, and systems for operator services, including directory assistance. Article 6 includes land and buildings, towers, and distributing frames. Article 7 includes a variety of operating centers and systems that perform support functions. Article 8 covers the Bell Information Network, a bulk data transfer network for internal Bell System computer to computer communications. None of these categories of SNFA contracts, or the property and facilities to which they apply, is arguably equivalent in function to the dedicated transmission services offered in the special access tariffs.

[19] Circuit equipment includes signalling and test equipment, coils, repeaters, and other equipment used in association with individual metallic circuits. Carrier systems are electronic devices that multiply the efficiency of metallic circuits, typically providing from 12 to 24 voice grade transmission paths using a single pair of copper wires.

[20] Radio facilities include microwave radio transmitters and receivers arranged to create transmission paths in assigned portions of spectrum. The Article 4B leases include the various transmission facilities used to create microwave transmission paths of specified bandwidth between two designated locations, linking termination points in two central offices or "other ownership demarcation point[s] agreed upon by the parties" including any intermediate repeaters or regenerators. Master SNFA at 373. The SNFA contract in each lease of microwave facilities specifies the number of multiplex slots provided, in digital or analog format or as an unchannelized base facility.

> multi-purpose transmission capability between designated locations, based on charges that are not usage sensitive.

MCI Opposition at ii. In response, the BOCs and AT&T cite numerous legal and technical differences which are said to distinguish special access and SNFAs.

27. Several of these purported differences plainly are not material functional differences, or are irrelevant to the question of whether the special access tariffs were unreasonably discriminatory. The BOCs argue, for example, that SNFAs are not common carrier communications services within the meaning of Section 202(a) of the Act. Ameritech Supp. Direct Case at 3-4; Bell Atlantic Supp. Direct Case at 3 n.7; BellSouth Supp. Direct Case at 7-11; NYNEX Supp. Direct Case at 5 n.8; Southwestern Bell Supp. Direct Case at 4-6. The BOCs maintain that they never held themselves out as offering SNFAs to the general public on an indiscriminate basis, as in the case of common carrier services. *E.g.*, Ameritech Supp. Direct Case at 17-18; Bell Atlantic Supp. Direct Case at 3 n.7; NYNEX Supp. Direct Case at 5 n.8; PacTel Supp. Direct Case at 4-6; US West Supp. Direct Case at 42-44; *see* AT&T Supp. Direct Case at 11-12. Some BOCs argue that SNFAs are leases, and therefore not common carrier services, citing California Water and Telephone, 64 FCC 2d 753, 755-59 (1977). Bell Atlantic Supp. Direct Case at 3 n.7; PacTel Supp. Direct Case at 14; Southwestern Bell Supp. Direct Case at 4-6. Ameritech argues that the sharing of equipment is not subject to regulation under Title II of the Communications Act. Ameritech Supp. Direct Case at 19. The defenders of SNFAs also claim they are not "like" special access because SNFAs constitute "retained property rights" in the predivestiture Bell System.

28. We do not find these characterizations to be relevant evidence of any difference in the functional equivalency of the two services. None of the differences in the legal status of SNFAs is associated with any practical difference in the functions provided by the two arrangements to customers. Whatever the significance of these distinctions to issues of justification for the separate arrangements and charges, issues to be addressed later in this Order, they evidence no difference in the functions provided by SNFAs and special access.

29. Some of the parties also contend that various differences in provisions associated with the charges assessed should be considered in determining whether the two arrangements are "like". SNFA charges, they point out, are calculated monthly from the costs associated with the specific facility. Special access rates are both more stable, because they are altered only when a transmittal takes effect that amends the tariff, and use a different ratesetting methodology, based on the projected average costs of facilities used for the service. *See, e.g.*, AT&T Supp. Direct Case at 18-19; Ameritech Supp. Direct Case at 22-25. SNFA charges are also calculated from AT&T's forecasts of capacity regardless of whether that capacity is actually used, and AT&T is allowed to alter its forecast only by 10 percent per year. No forecasts are required of special access customers, who pay only for the circuits ordered and put in service. Further, AT&T must give 6 to 18 months' notice if it wants to terminate a SNFA before the scheduled termination date. BellSouth Supp. Direct Case at 21-22. Other costs said to be unique to SNFAs include those required by AT&T to re-engineer its SNFA facilities and in some cases to rearrange connecting circuits when a SNFA is terminated. *See* AT&T Direct Case at 21-22. The respondents also point out that SNFAs are permitted to be in effect only for a fixed period of time, while there is no set termination date for special access service. *See, e.g.*, BellSouth Supp. Direct Case at 21-22.

30. MCI argues generally that the flexibility afforded AT&T did not differ materially in the two cases: AT&T could choose whether to enter into a SNFA at the time of divestiture; can adjust leased capacity up or down; and can choose how long to lease SNFA facilities. MCI Opposition at 46-47. MCI also maintains that the fees charged to AT&T for the early termination of SNFAs are not important, because these fees could be waived. *Id.* at 47-48. MCI alleges largely unrestricted flexibility in modifying transmission capacity forecasts, because AT&T and the BOCs have the ability to reforecast at any time by mutual consent. MCI dismisses the fees for exceeding capacity as too small to affect AT&T's actions. *Id.* at 48-49.

31. An examination of the SNFAs and the tariffs makes clear that there are numerous differences in the procedures for ordering facilities, computing and assessing charges, and eventually terminating service. But here again the differences in the charges for the two arrangements, or the terms associated with those charges, are not associated with differences in the functions provided by SNFAs or special access. They do not affect the transmission capabilities and performance offered in either case. Rather, these differences affect the price, which is not a functional difference.

32. More pertinently, the BOCs and AT&T identify legal and geographical limitations on the availability of SNFA arrangements that prevent them from being used as effective substitutes for special access services by AT&T, and thus from being "like" those services. MCI contends in response that the restrictions on SNFAs discussed by AT&T and the BOCs are material only as to the extent of discrimination, not its existence. MCI Opposition at 36.

33. The most important geographical restriction arises from the fact that SNFAs applied only to interexchange facilities, *i.e.*, to facilities linking separate telephone exchanges. Special access channels generally originate within local exchanges, to provide transmission channels linking communications equipment at a customer's premises with the interexchange transmission facilities and equipment, typically at an IC point of presence (POP).[21] AT&T Supp. Direct Case at 15-16; NYNEX Supp. Direct Case at 14-16, 20-21, 34; Southwestern Bell Supp. Direct Case at 7, 12-13; US West Supp. Direct Case at 33-34. Because SNFAs are limited to interexchange facilities, they cannot perform the essential function of these special access endlinks: providing dedicated transmission channels for the origination and termination of interstate communications. A difference in applicable geographical restrictions can be a material functional difference between

[21] Special access lines used for private line services have this configuration. WATS and 800 Service lines are also classified as special access, but may extend only between the end users premises and a LEC switched designated as a WATS serving office; transmission from WATS service offices to the IC POP is provided under the separate switched access portions of the LEC tariffs.

two offerings, and we find that is the case here. SNFAs are not available to link BOC end offices and the premises of AT&T's customers and thus are incapable of performing the function of endlink special access channels. Moreover, there was no discrimination in the availability and provisioning of endlinks. AT&T obtained all BOC endlink channels as special access, once those tariffs went into effect. We accordingly conclude that special access endlinks are not "like" the facilities provided under SNFAs.

34. While it is apparently an uncommon practice, special access may also be ordered as what could appropriately be described as midlinks, to connect two IC POPs or other IC premises. These POP to POP channels cannot originate or terminate the traffic of end users, but can be used by an IC to carry its own switched or private line service traffic, as an alternative to building "facilities between the two locations, routing the traffic along other transmission paths in its network, or obtaining facilities from some other provider. Special access channels, when ordered as midlinks, provide the same end-to-end transmission, the same range of bit rates and capacities, and the same optional features as endlinks.

35. Even as midlinks, however, SNFA channels were geographically restricted in another way. SNFA contracts were available to AT&T only at a limited number of specified locations, where BOC use of the facility predominated as of January 1, 1984 (the effective date of the Bell System divestiture) but AT&T retained a continuing need for the facilities. Such locations were a relatively small proportion of BOC offices and interexchange transmission paths. Ameritech states, for example, that SNFA contracts were available in only 21 percent of its end offices. Ameritech Reply at 13. At all locations and routes linking locations where no SNFA transmission facilities were available, AT&T faced the same transmission options as other ICs: to obtain service under special access or to build or otherwise acquire its own facilities. This inherent geographic limitation on the availability of SNFA contracts, due to the terms of divestiture, which prevented their use at many locations and routes, again constitutes a material functional difference between SNFA contracts and the special access offerings at locations where SNFAs were not available. Therefore, no issue of likeness or discrimination arises in these geographic locations.

36. A third geographical restriction was imposed by the MFJ. The decree generally bars the BOCs from providing services or facilities beyond the borders of designated LATAs. 552 F.Supp. at 186. This restriction has been interpreted by the parties as applying to BOC access tariffs including special access, and those tariffs accordingly do not offer channels that cross LATA boundaries, either to AT&T or other ICs. SNFA midlinks are not subject to this restriction and many of the transmission SNFAs are in fact physically interLATA. NYNEX reports that 56 percent of its transmission SNFAs are interLATA, Pacific 26.6 percent, and Southwestern Bell 25 percent.

37. MCI raises three reasons to reject this difference and include interLATA facilities in the comparison of "like" services. MCI Supplemental Opposition at 14, n.37. First, it contends that the BOCs provide little or no evidence of specific interLATA SNFAs. In fact, though, there is substantial evidence of interLATA SNFAs, in addition to the BOCs statements on the matter, as clearly demonstrated by the termination points of the facilities listed in individual SNFAs. Our own review of the SNFAs indicates that a substantial portion are interLATA. *See* Attachment D, Table 1 of this Order. Second, MCI argues that acceptance of the BOC argument does not eliminate the alleged discrimination, because other SNFAs do not cross LATA borders. The relevant point, however, is that MCI's inclusion of interLATA SNFAs among "like" services overstates the extent of any possible discrimination. MCI's response appears to concede that its calculations include this overstatement. Finally, MCI argues that interLATA SNFAs provide the equivalent of transmission paths within two individual LATAs, paths that other ICs would have to purchase tariffed special access to duplicate. This argument is also unpersuasive. The BOCs are expressly forbidden to offer tariffed interLATA service, and connection of two special access services at a LATA boundary to provide a transmission path between two LATAs would violate this ban. The special access tariffs reflect this -- facility demarcation points at LATA borders are not customer premises, the points at which service is offered. There has apparently been no offering in the special access tariffs of interLATA channels capable of performing the transmission functions of these interLATA SNFAs. We accordingly conclude that interLATA SNFAs are not "like" special access.

38. One other geographic restriction cited by NYNEX is that its special access tariffs do not permit designation of a BOC wire center as a customer premises. Because special access may only connect "customer designated premises," NYNEX contends, AT&T could not use special access as an alternative to SNFAs that terminate at a NYNEX wire center, such as SNFAs linking AT&T POPs to BOC end offices. One effect of this restriction is to limit co-location at end offices to AT&T SNFAs. Unlike the MFJ restrictions, however, this tariff restriction was apparently of matter of NYNEX's own choice. We do not find this restriction a basis for concluding that POP-to-end office SNFAs are not discriminatory in relation to the special access facilities offered to other ICs.

**3. The Special Case Presented by "Piece-Part" SNFAs**

39. The arrangements that remain to be considered are intraLATA Article 3 and 4 SNFAs, at locations and routes where they were physically available. It is these arrangements that are the focus of MCI's arguments, first that they are "like" because both constitute offerings of multi-purpose transmission capability between designated locations, and second, that the SNFAs were available only to AT&T at rates much lower than equivalent special access. MCI's analysis is directed to a comparison of the rates actually charged for just those actual midlinks obtained by AT&T under SNFA, with the rates it claims would have been charged for equivalent midlinks under applicable special access tariffs.

40. MCI claims that there are a total of about 8200 SNFA contracts of this type that are "like" special access, and it is for these contracts that MCI claims AT&T savings of $1.989 billion over a four-year period, in comparison to the rates it would have been charged for the same facilities under applicable special access tariffs. MCI Opposition at 56. In support of this calculation, MCI provides one example calculation for each of the seven regional BOCs of the charges for a transmission SNFA and of what MCI claims would have been charged to AT&T for equivalent special access channels.

41. The BOCs and AT&T contend that a substantial number of the SNFA contracts, including those cited in MCI's opposition, do not provide point-to-point transmission paths, but only piece parts of the facilities required to provide a complete transmission path or communication service. AT&T explains that this is frequently the case with SNFAs:

> Because the predominant use test by which assets were assigned at divestiture was applied to individual work areas and equipment bays within buildings and to separate segments of cable routes, the divestiture resulted in a patchwork of AT&T-owned and BOC-owned facilities which often must be combined or linked together to form a complete circuit. For example, it is frequently the case that AT&T owns the cable or radio facility, and one of the BOCs owns the terminal electronics at one or both ends of the facility and leases those electronics to AT&T under SNFAs. In other instances AT&T obtains a cable from a BOC under SNFA, but has its own electronic equipment at one or both ends of the cable.

AT&T Reply at 19 (references in footnotes omitted). *See also* Ameritech Reply at 37-38; Bell Atlantic Reply at 18-21; BellSouth Reply at 13-17; NYNEX Reply at 8-10; Southwestern Bell Reply at 6-9; US West Reply at 26-27. AT&T and the BOCs argue that these "piece-part" SNFAs, which must be integrated with other facilities by AT&T in order to complete the transmission path, are not "like" the complete, point-to-point services provided by the special access tariffs.

42. MCI does not directly address this issue, but is apparently responding to such contentions in claiming that AT&T and the BOCs are presenting the already-discredited argument that two arrangements are not "like" because special access is a service and SNFAs provide only the use of facilities. MCI Opposition at 30-31. Sprint contends that the attempt to differentiate special access as an "integrated" service and SNFAs as component parts is only a variant of the facilities and service argument. Sprint Opposition at 5.

**a. "Likeness" of Piece-Part SNFAs**

43. The offering of a facility or set of facilities can be "like" the offering of a service under the practical test of functional equivalence. The actual material functions offered to meet customer needs are what matters, not the labels placed on the two arrangements. If the offer of the facilities does provide all the material functions of an alternative service, so that the choice from the perspective of the customer is effectively a matter of price, the two arrangements are "like" under Section 202(a). *Ad Hoc,* 680 F.2d at 797. At least one of the BOCs concedes this point: "Admittedly, had MCI been able to show ... that ... AT&T was able to combine those SNFA piece parts with one another to form an end-to-end circuit, then there would arguably be no distinction to be drawn between the leasing of SNFA facilities and provision of special access service." US West Reply at 33.

44. Equally, however, a facilities lease or set of leases that omits material functions, so that the customer must not only evaluate the relative prices but also undertake to obtain additional important facilities or functions from some other source, is not "like" a service package that provides such functions. In the telecommunications arena, the lease of discrete pieces of transmission facilities is not "like" a transmission service, if those pieces cannot in fact be used to create a transmission path, and additional facilities must be constructed or other operations must be undertaken.

**b. The Record Evidence on Piece-Part SNFAs**

45. Based upon our examination of the SNFAs and the record, it does appear that the process of dividing the ownership of Bell System assets has established a great many piece-part Article 3 and 4 SNFAs that cannot of themselves be used by AT&T to assemble transmission paths, and thus are not "like" special access. To establish a channel capable of transmitting input information between two points in a modern network requires, at a minimum, both a transmission facility linking the two points -- for example, wire cables, optical fibers, or microwave radio transceivers -- and electronic equipment to perform a variety of signalling, support, and channel derivation functions.

46. A typical example in the SNFA contracts is the provision of voice grade channels by use of N-carrier systems. The N-carrier transmission facility is a wire cable, arranged as a pair of wires within a cable sheath to provide two-way service. Electronic repeaters are spaced at intervals along the cable pair to amplify and regenerate the signals being transmitted. This base facility could transmit a single voice signal, but in interexchange applications, N-carrier multiplexing equipment is added at both ends of the cable pair to create 12 or more voice grade equivalent channels. *See Engineering and Operations in the Bell System* 307-15 (7th ed. 1982). These individual, derived channels typically are then connected to voice grade cable pairs at a wire center to complete the channel. Because the Article 3 SNFA contracts cover cable pairs and repeaters (*i.e.*, the transmission facilities) and Article 4 covers the carrier facilities (*i.e.*, the necessary central office multiplexing equipment), assembly of an end-to-end N-carrier transmission path by AT&T requires three separate SNFA contracts: one Article 3 N-carrier cable pair lease and two Article 4 carrier-on-cable central office leases. Those contracted-for facilities would also, of course, have to be available in the right locations. Article 4B microwave transmission facilities similarly require compatible Article 4A COE at each end of the facility.

47. In many cases, facilities under SNFAs could not be configured in this manner, because AT&T was not offered the necessary components under SNFA, or the transmission path itself was incomplete. For example, MCI identifies 340 BellSouth Article 3 and 130 BellSouth Article 4 SNFA's that it claims are "like" special access. MCI Opposition, Exhibits Volume II, Tab B. BellSouth replies that of the Article 3 SNFAs, only 21 (or 6 percent) in fact provided a transmission path between AT&T POPs and only 61 (or 18 percent) between an AT&T POP and a BellSouth wire center. The remaining SNFAs provided only segments of a transmission path. Of the remaining 258 SNFAs, according to BellSouth, 110 connect BellSouth wire centers, 80 connect various other demarcation points

along the circuit such as repeaters and cross connects,[22] 128 connect an AT&T POP to some intermediate point such as a repeater,[23] and one is associated with a guyed tower. In each of these cases, AT&T would be required to use terminal equipment and transmission facilities of its own to engineer an end-to-end transmission path.

48. The pattern is similar for Article 4 microwave transmission SNFAs. Of 130 BellSouth Article 4 SNFAs claimed by MCI to be "like" special access, at most six (or about 5 percent) provide a transmission path between AT&T POPs.[24] The remaining 126 include leases for multiplexing equipment (15), regenerating equipment (20), and antennas (7). Among SNFAs for radio transmission capacity, 18 do not connect to POPs, 4 are linked to POPs at only one end, and 60 involve cases where BellSouth does not own all the radio transmission equipment, so that AT&T-owned equipment is required at one or more locations to complete the transmission path.

49. BellSouth provides one of the best surveys in the record of the nature and extent of "piece-part" SNFAs. Other BOCs discuss these facilities anecdotally, but do not provide a consistent, documented analysis of the transmission SNFAs that provided complete intraLATA transmission paths and those that did not. To address this question, we have analyzed samples of SNFAs in BOC regions, to estimate the number and percentage of Article 3 and 4 SNFAs that provided AT&T with the minimal facilities necessary to assemble a complete transmission path, *i.e.*, a transmission facility linking the full route between the A and Z end points and central office equipment of the type and quantity necessary to terminate the transmission facility at both of those points. For each region, we generally selected one state and examined all Article 3 and 4 transmission SNFAs provided to AT&T in that state. We also examined the SNFA selected by MCI as its example for each BOC.

50. A summary of our review of the BellSouth SNFAs will illustrate the method in detail. For BellSouth we examined all 25 Article 3 and all 22 Article 4B SNFAs in Mississippi. Four Article 3 SNFAs have no central office equipment at either end[25] and nine are associated with central office equipment at only one end.[26] Only twelve of the 25 Article 3 SNFAs have central office equipment available at both ends.[27] Among the Article 4B SNFAs, five have no central office equipment at either end[28] and thirteen have central office equipment at one end.[29] Only four of the 22 Article 4B SNFAs have central office equipment at both ends.[30]

51. The single example of a BellSouth transmission SNFA selected by MCI is in the piece-part category. This Article 3 SNFA, No. 33124, is for 12 N-carrier cable pairs out of a total capacity of 65, linking Crowley and Rayne, Louisiana. BellSouth also provides central office N-carrier equipment that can be used to terminate these cable pairs in an Article 4 SNFA, No. 43111,[31] but only at the Crowley terminus. At Rayne, AT&T apparently either owns the necessary central office equipment or connects the cable pairs to its own transmission facilities. AT&T does not receive a complete, end-to-end transmission path.

52. Because the SNFAs themselves do not identify whether the A and Z points are AT&T POPs, BellSouth end offices, or other locations, it is not possible to determine fully whether the facilities are complete between AT&T locations. The A and B points designate the location of the SNFA along a facility, but do not imply that it is complete, according to BellSouth. It is thus possible that some of the transmission paths we have described as complete do not link AT&T locations. Our analysis nonetheless does appear to confirm BellSouth's description of the facilities as largely piece-part in nature. Only at most 16 of the 47 Mississippi transmission SNFAs, or 34 percent, are physically capable of creating complete transmission paths.

53. Some of the BOCs' transmission takes place under Network of Facilities (NOF) SNFAs, a mechanism that receives particular attention from MCI. It claims that

> in many "network of facilities" SNFAs the leased transmission capability may be provided out of different facilities at different times. At any given time, the BOCs cannot even identify the specific facilities used to provide the transmission. *See* Varetoni, D.Tr. 187. In those instances the transmission capability leased under SNFA is much more analogous to the receipt of a *service* than to the use of a *facility*.

MCI Opposition at 31 n.72 (emphasis in original).

54. Section 3.A.02 of the Master SNFA, in cases where the BOC owns the entire point-to-point transmission facility, permits the provision of transmission between those points either on a "network capacity" or NOF basis or by lease of designated types of plant facilities and structures. BellSouth states that it did not establish NOF SNFAs, but several BOCs did, for both cable and microwave radio transmission paths. *See* Master SNFA Section 4.A.22.h.[32] These NOF SNFAs did provide

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[22] Of these, 46 are between two repeaters, 16 are between a wire center and a repeater, 10 are between a non-POP and a cross-connect point, seven are between non-POPs, and one is between a repeater and a cross-connect point. BellSouth Reply at 37-38 n.68.

[23] BellSouth states that 53 connect a POP to a repeater, nine to a cross-connect point, and five to a non-POP. *Id.*

[24] BellSouth states that four SNFAs in South Central Bell territory provide POP to POP transmission and two SNFAs in Southern Bell territory are "associated with POPs." *Id.* at 15-16.

[25] SNFAs 34012, 34013, 34016, and 34018.

[26] SNFAs 34011, 34015, 34017, 34019, 34020, 34023, 34024, 34025, and 34028.

[27] SNFAs 34010, 34014, 34021, 34022, 34026, 34027, 34029, 34030, 34031, 34032, 34033, and 34034.

[28] SNFAs 44216, 44225, 44287, 44294, and 44301.

[29] SNFAs 44214, 44218, 44223, 44229, 44238, 44245, 44259, 44266, 44280, 44315, 44323, 44324, and 44325.

[30] SNFAs 44207, 44226, 44252, and 44273.

[31] MCI does not include the charges for this Article 4 SNFA in its comparison of the rates under SNFA and the rates under special access.

[32] Although Bell Atlantic states that NOF SNFAs "are chiefly billing arrangements, designed to simplify the billing when a number of similar facilities are provided in an area" (Bell Atlantic Reply at 22 n.47), NOF SNFAs do appear to provide essentially a specified amount of transmission between points rather than a share of any specific facility. An Ameritech

complete transmission facilities, it appears, but frequently AT&T was required to provide the necessary central office equipment. US West states that NOFs represent only "a minority share of [its] Article 3 and 4 schedules" and in most cases provided only the transmission facility, or a transmission facility with terminal equipment only at one end. US West Reply at 21-26. Twelve NOFs, for example, are only leases of antennas where AT&T owned the radio terminal equipment. US West lists 65 NOF schedules that it claims lack functions equivalent to special access and states that its review of transmission SNFAs cited by MCI shows that "only 14 percent could possibly be subject to further review for potential likeness." *Id.* at 27.

55. To evaluate this example of NOF SNFAs, we examined all Minnesota SNFAs, 34 Article 3 and 19 Article 4B NOFs. Of the Article 3 SNFAs, 12 are interLATA, eight have COE at only one end, three have COE at neither end, two terminate at locations where the available COE is not a matching technology, one involves a guyed tower, one became another SNFA after a term change, and seven or 20.5 percent appear to provide complete transmission paths with appropriate COE. Among the 19 Article 4 NOFs, one has COE at only one end, 12 have COE at neither end, and six terminate at switches or other locations. None appears to provide a complete transmission path, including appropriate COE. This sample appears to confirm US West's contention that only a small fraction of its SNFAs, in this case seven out 53 or 13 percent, provides complete transmission paths.

56. The example chosen by MCI does, however, appear capable of providing an end-to-end facility. SNFA 12008 provides two of the 41 available N-carrier cable pairs on a route between Owatonna and Rochester, Minnesota, including repeaters and other intermediate equipment. SNFA 13003 provides central office VF circuit equipment and carrier equipment at Owatonna and SNFA 13004 provides similar equipment at Rochester.

57. We analyzed the SNFAs of the other BOCs in the same manner, generally selecting one state where we examined all transmission SNFAs. The two exceptions were NYNEX, for whom we examined a sample of SNFAs in New York State, and PacTel, for whom we examined a sample of California SNFAs.[33] This review of a total of 561 SNFAs is not based on a statistically random sample of SNFAs, but should provide a representative selection of SNFAs, including all geographical regions of the country, various mixes of facilities, and both facility-specific and NOF SNFAs. We also examined comments in the record relevant to these SNFAs. These results are summarized in Attachment D of this Order.

58. Overall, this review demonstrates that a large majority of transmission SNFAs provided either piece-parts of facilities that could not be assembled into transmission paths without additional facilities and equipment, or transmission paths that were not available under the special access tariffs, notably interLATA channels. Only 88 of the 561 SNFAs we examined, or 15.7 percent, appeared to provide complete, intraLATA transmission paths between A and Z points where appropriate COE was also available. The BOCs, with the exception of NYNEX, did not report the number of complete intraLATA transmission SNFAs, but the reported numbers are consistent with our review of the filed SNFAs. The numbers range from zero for Ameritech, 24 (or about 1.5 percent) of all transmission SNFAs for NYNEX, 25 (or 5 percent) for BellSouth, and as many as 268 (or 46 percent) for PacTel.

59. In Volume II of its Appendix, MCI lists a total of 8925 Article 3 and 4 SNFAs for facilities leased by AT&T, and alleges that 8217, or 92.6 percent, are "like" special access services. Totals from MCI's lists are displayed in Attachment C of this Order, Table 5. Our analysis of this representative sample of SNFAs indicates that MCI's totals grossly overstate the number of SNFAs that provide complete transmission paths and thus can arguably be considered "like." To reach a more accurate estimate, we multiplied MCI's figure for the total number of Articles 3 and 4 SNFAs in each region by the percentage of complete transmission path SNFAs indicated by our survey.[34] Based upon this calculation, our best estimate for the number of SNFAs that are "like" special access, to the extent of providing complete intraLATA transmission paths, is 1647, or 18.4 percent. These results are tabulated in Attachment D of this Order.

60. This estimate may still overstate "like" SNFAs, for several reasons. Our analysis looked only at the availability of ostensibly compatible transmission facilities and COE. In some cases the COE may not in fact be usable with the specific "transmission facility, or the quantities may not match. We have also assumed that Article 7 SNFAs are always available to provide additional maintenance and engineering. *See* paras. 76-77 *infra*. This may not always be the case. As in the BellSouth case, some Article 3 SNFAs also stop short of their stated "A" or "Z" points, and therefore do not provide a complete end-to-end transmission path. There are indications of this for other BOCs as well. For example, four Wisconsin SNFAs have the same "A" and "Z" points listed,[35] but all have different mileages. Similarly, at least two Texas SNFAs have the same "A" and "Z" points but different mileages.[36] It is not clear whether some of those SNFAs are incomplete or follow different routes. Our estimate is overstated to the extent that it includes any incomplete SNFAs.

61. We also may have understated interLATA SNFAs. Ameritech and Bell Atlantic SNFAs do not always specify the LATA in which the SNFA facilities are located, and therefore our survey may have incorrectly classified some interLATA SNFAs as intraLATA. There are also a number

witness states that "in a network of facilities, the equivalent DS-1 slots may have been distributed over several T-carrier systems." MCI Opposition, Exhibits Vol. 3, Tab 2, Deposition of Varetoni at 187. US West also indicates that NOFs "provided for the leasing of capacity for several network components in a manner consistent with AT&T's network requirements" for complete cable and microwave paths. US West Reply at 21-22.

[33] In PacTel's case, the sample was made up of all Article 4 SNFAs in California, and all Article 3 SNFAs in California with a serial number ending in ". For NYNEX, we used a sample of all Article 4 SNFAs and Article 3 SNFAs with a serial number ending in " in New York.

[34] We used a lower figure than MCI for total Article 3 and 4 SNFAs for PacTel. *See* para. 62, *infra*.

[35] Wisconsin SNFAs 20023, 20024, 20025, and 20026 all list MDSNWI02 and MDSNWI11 as their same "A" and "Z" points, but each has different mileages.

[36] Texas SNFAs 25650 and 25780 have HSTNTX01 AND HSTNTX08 as their "A" and "Z" points, but differ in mileage.

of LATAs which cross state borders, usually only slightly.[37] Occasionally, an interstate, intraLATA SNFA facility is listed in the schedules of both states even though the facility provides only one transmission path. The example SNFA selected by MCI for Southwestern Bell is of this type, with SNFAs in two states listed separately but providing only one transmission path.[38] Our sample of individual states may double count those SNFAs when extrapolated to the entire region.

62. Finally, some overstatement may have been introduced by the use of MCI's figures for the total number of Article 3 and 4 SNFAs in each region. During the course of our survey, we counted 441 Article 3 and Article 4 NOF SNFAs in California and Nevada.[39] MCI reports 585. Using MCI's figure for PacTel would have increased the estimate from 1647 to 1890, or from 18.4 percent to 21.2 percent.[40] It is not clear whether or to what extent MCI overstated the totals for the other BOCs.

63. On the other hand, with one possible exception, we do not believe there are any factors that would indicate our estimate is too low.[41] Therefore, 1647, or 18.4 percent is best viewed as the upper bound for the number of Article 3 and Article 4B NOF SNFAs that provide the functions of complete, intraLATA, midlink transmission paths.

**c. Differences in Provisioning of IntraLATA Transmission Paths**

64. While complete, intraLATA transmission SNFAs linking AT&T POPs to other POPs, BOC end offices, and independent telephone company facilities thus are a small portion of the total SNFA contracts, the record demonstrates that such configurations of SNFA equipment and facilities have existed. The record also indicates that AT&T could have used special access as an alternative to those SNFAs.[42] Internal AT&T documents indicate that special access could be an "alternative to SNFA for utilizing the BOC to provide transmission facilities after SNFA terminates or where it is not authorized."[43] MCI argues that these and other AT&T documents,[44] "demonstrate beyond question that AT&T considered leased capacity on SNFA facilities and special access services to be functionally equivalent, and chose between them solely on the basis of cost." MCI Opposition at 23.

65. AT&T and the BOCs rebut this argument and assert that SNFAs differed substantially from special access in ways that apply to intraLATA transmission paths, even if the two arrangements might be considered theoretical alternatives. AT&T states that SNFAs were considered parts of its own network which "were usually replaced with internally constructed AT&T facilities .... From AT&T's standpoint, SNFA and special access present significant functional, contractual, and administrative differences such that they cannot be regarded as being like' each other." AT&T Reply, Evidence Binder Tab 26, Affidavit of E. Van Blaricum. We turn to the issue of whether these differences, to the extent they exist in fact, are material functional differences.

**(1) Limitations on duration of availability and adjustments to ordered capacity**

66. Transmission SNFAs are limited, by the terms of the contracts, to an initial term of five-years and a single renewal period of three years. Master SNFA, Article 3.A.07, 3.A.08. This maximum eight-year period ends December 31, 1991. Adjustments to the level of facilities available to AT&T also are limited. As a matter of contractual right, AT&T may only revise its ordered capacity in an annual forecast and may not increase its forecast above existing capacity or reduce it by more than

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[37] For example, the Fargo, North Dakota, LATA includes parts of Minnesota. The Kansas City LATA includes parts of Kansas and Missouri. The Washington, D.C., LATA includes parts of Maryland and Virginia.

[38] Bell Atlantic cites D.C. SNFA 13001 and Virginia SNFA 33008 as an example of double counting in MCI's calculations. Bell Atlantic Reply at 36 n.80.

[39] This includes 437 in California and 4 in Nevada.

[40] BellSouth reports a figure of 472 for total Article 3 and Article 4 SNFAs, while MCI alleges 1242. NYNEX reports 1851, while MCI alleges 2070.

[41] PacTel asserts that 268 of 587, or 45.7 percent of its SNFAs, have central office equipment at both ends. Our survey produced an estimate of 115 of 441, or 26.3 percent. This may indicate an understatement of "like" SNFAs in PacTel's region. However, we have not been able to identify any systematic bias in our survey of PacTel's region, and therefore believe it is more probable that PacTel's figures are in error, under our analysis of what constitutes "like" SNFAs.

[42] One AT&T witness stated in a deposition, in answer to a question by an MCI attorney:

> Q. The range of situations where AT&T used or continues to use transmission facilities under SNFA to transmit voice traffic under SNFA between two points, can you think of any situation where access tariffs could not be used instead of those transmission facilities to move the traffic between the two points?
>
> A. On a theoretical basis, I cannot think of any...

MCI Opposition Vol. III, Tab 3, Deposition of Guida at 101. On cross-examination the witness clarified this statement:

> Q. Is SNFA in fact -- is special access in fact a realistic option in all cases where AT&T is using SNFA transmission facilities?
>
> A. No, it isn't in all cases, as I've pointed out before. AT&T had owned pieces of equipment as part of the overall circuit that was being used and consequently those are integrated into the circuit design. And therefore is was not in all cases.
>
> Q. Why then under those circumstances would special access not be a realistic option?
>
> A. Because of the fact that AT&T would have had to abandon plant that it owned, and it was just not a practical matter.
>
> Q. Why would AT&T have to have abandoned the plant?
>
> A. Because the fact is that that portion of the circuit was made up of various bits and pieces of AT&T equipment. And for us to have to use special access between those two locations would have meant that AT&T would not have been able to use that equipment as part of its overall circuit design.

AT&T Reply, Evidence Binder, Tab 6, Deposition of Guida at 182-83. These practical problems with use of special access would not apply to complete intraLATA transmission facilities.

[43] "AT&T Information Letter re Alternative Financial Arrangements to SNFA," AT&T 0700209, MCI Deposition Exhibit 357A.

[44] MCI also cites, for example, instances where AT&T requested the conversion of tariffed access service to leased capacity under SNFA, without change in the facilities used, and where AT&T extended SNFA leases where a study showed using access for the transmission path would have been more expensive. MCI Opposition at 24-26.

10 percent yearly. Master SNFA Art. 1.A.05. Special access services may be ordered or canceled at virtually any time and used indefinitely.

67. While in some cases limitations of the type imposed by SNFAs might have a practical effect on the functions a service or facility is capable of providing to a customer, that does not appear to be the case here. Any facility or service has a limited life, whether from obsolescence, changes in needs, or other factors. Part of the planning process for both SNFA and special access transmission paths would include planning for their eventual replacement. The right to use these facilities for up to eight years provided a fairly distant planning horizon for SNFAs which would not appear to restrict AT&T's use of the facilities to any substantial degree. Moreover, for the intraLATA transmission facilities at issue, AT&T was frequently planning to construct its own facilities. Either SNFA or special access facilities would be "bridge" facilities for temporary use until these replacements could be built, regardless of the formal time limits applicable to SNFAs.

68. The forecasting procedures also do not appear to impose a substantial limitation on the functionality of transmission SNFAs. AT&T could continue to use the full forecasted transmission capacity for the life of the contract and the forecasting process primarily gave it an opportunity to reduce the SNFA charges when it no longer required this level of capacity but did not desire early termination. The procedures thus affected the price AT&T paid, but not its ability to use transmission SNFAs to meet its transmission needs.[45]

**(2) The use of outdated and obsolescent facilities in SNFAs**

69. SNFAs were limited to facilities in service or planned at the date of divestiture, and AT&T and the BOCs argue that these facilities "consisted largely of older technology that is often outmoded today" such as analog facilities and older style digital facilities that "are no longer considered technologically state-of-the-art." AT&T Reply at 22 & n.**. *See also* Bell Atlantic Supp. Direct Case at 4-5; BellSouth Supp. Direct Case at 20-21; NYNEX Supp. Case at 27, 33; Southwestern Bell Supp. Direct Case, Att. 2, at 24; US West Supp. Direct Case at 32. AT&T witnesses state that "[w]hen ordering special access today, [they] would not normally expect to receive service over such facilities, with their increased downtime, reduction of transmission quality and inability to provide clear' channels." AT&T Reply, Tab 29, Affidavit of J. Veatch at 5; Tab 30, Affidavit of J. Guntner at 6; Tab 34, Affidavit of C. Brown at 6.

70. These statements provide no quantification of the actual difference in the technological level of transmission provided under SNFA and special access facilities, especially during the first few years after divestiture when facilities in place were newer and planned facilities subject to SNFA contracts were still coming into service. In the absence of supporting evidence this assertion seems weak. The transmission standards applicable to special access and SNFAs are not claimed to differ and the BOCs commit themselves to maintain those standards in both cases. The BOCs also retain the right to provide special access service over any facility or technology so long as it meets those standards, so AT&T could have no assurance that any particular special access channel would be of higher quality than a SNFA facility. As MCI suggests, it might well have been provided over the same facility. MCI Opposition at 37-38. Moreover, although AT&T claims this was "seldom" done, SNFA facilities could be upgraded by the owner. AT&T was then entitled to the same capacity available under the retired facility for the term of the SNFA lease.

71. Finally, the statements of AT&T's witnesses do not suggest that any technological gap that did develop over the years between SNFAs and special access was of practical significance. The differences cited are not claimed to have prevented SNFAs from being used for the same purpose as special access.

**(3) Responsibility for engineering, design, maintenance, and testing**

72. The BOCs assert that they are obligated to provide more maintenance and support services under special access than they are under SNFAs. Ameritech Supp. Direct Case at 22-25; Bell Atlantic Supp. Direct Case at 8; NYNEX Supp. Direct Case at 23-27; PacTel Supp. Direct Case at 11-12; Southwestern Bell Supp. Direct Case at 13-14; US West Supp. Direct Case at 40-41. AT&T and the BOCs argue that AT&T "must design, test, engineer, and integrate each piece of [SNFA] facilities." AT&T Supp. Direct Case at 16. *See also* BellSouth Supp. Direct Case at 23-24; NYNEX Supp. Direct Case at'-23-27; PacTel Supp. Direct Case at 20. Those functions are included as part of special access by the BOCs, who commit themselves to providing and maintaining these services. Some BOCs allege that if there is an equipment malfunction, AT&T must locate the faulty circuit for SNFA facilities, while the BOCs must locate it under special access. Ameritech Supp. Direct Case at 24; NYNEX Supp. Direct Case at 28-31. Finally, Ameritech claims it uses the Trunks Integrated Record Keeping System (TIRKS) as part of its support system to correlate the pieces of a special access service, while SNFAs have no correlation system. Ameritech Supp. Direct Case at 25.

73. MCI, on the other hand, asserts that there is no technical difference between the two arrangements, which share the same multifunction facilities, and that the BOCs support, test, and maintain this single network using the same support systems and same performance standards. According to MCI, some facilities are used for SNFAs and special access simultaneously, and the special access facilities and SNFA facilities are so interconnected that the BOCs are not able to provide different levels of support services. MCI Opposition at 37-38. MCI also alleges that the Master SNFA mandates that the BOCs use TIRKS to support SNFA equipment by monitoring its usage, and usage of equipment eligible to be leased under SNFAs. *Id.* at 40-41. NYNEX replies that, even though the same facilities can be used for both SNFAs and special access, the same channels cannot be used for both simultaneously. NYNEX Reply at 28-30.

[45] AT&T and the BOCs also note that SNFAs were limited to the "ultimate capacity" of the facility as planned at the time of divestiture and that the owner retained priority to meet its own needs. *See, e.g.*, Southwestern Bell Reply at 14. While the limitation on capacity and priority could be material differences in the same sense as the limits on geographic availability, the record provides no indication that these limits were of practical significance to AT&T.

**i. Facility vs. circuit level support**

74. One example cited by the BOCs is that the BOC is only responsible for providing "facilities level support" to SNFA facilities, while special access facilities receive "service level support," in which maintenance is provided to the individual circuits provided by the facility. Bell Atlantic Reply at 21 n.44. In providing service level support, the BOCs claim to undertake comprehensive provisioning, design, testing, and maintenance services, with "exacting performance and transmission requirements," while facilities level support is meant only to keep the facilities operational. Ameritech Reply at 30-31; BellSouth Reply at 27-28; NYNEX Reply at 29-30; PacTel Reply at 5-6; Southwestern Bell Reply at 15.

75. For example, a DS-1 facility might be used to provide 24 voice circuits. AT&T's witnesses state that "AT&T was generally responsible for conducting or contracting for circuit-level testing on Article 3 and 4 SNFA facilities it acquired for purposes of maintenance and provisioning changes, and for clearance of customer-reported trouble." AT&T Reply, Evidence Binder Tab 32, Affidavit of A. Cannizzaro at 6.[46]

76. The fact that circuit-level maintenance was not provided under Articles 3 and 4 does not, however, distinguish SNFAs and special access functionally, at least for intraLATA transmission paths. AT&T and the BOCs agree that AT&T could obtain circuit level testing as an option, at additional cost, under SNFA Article 7. AT&T Reply, Evidence Binder Tab 32, Affidavit of A. Cannizzaro at 6; Tab 26, Affidavit of E. Van Blaricum at 7; Tab 29, Affidavit of J. Veatch at 6; Tab 30, Affidavit of J. Guntner at 7-8; Tab 33, Affidavit of V. Gallagher at 4; Tab 34, Affidavit of C. Brown at 7; Tab 36, Affidavit of G. Parks at 7. AT&T frequently availed itself of this option, and estimates that payments under Article 7 for support of transmission facilities, including Article 3 and 4 SNFAs and AT&T-owned facilities, totalled $220 million from April 1985 through March 1989. *Id.*, Evidence Binder Tab 37, Supp. Affidavit of V. Tart at 4. Ameritech states that AT&T paid it $20.7 million in SNFA charges for stand-alone use of its operating centers for support services during 1985 alone, an amount greater than total Article 3 and 4 transmission facility charges during that year. Ameritech Reply at 36.

77. AT&T and the BOCs do not identify or claim any significant difference in the circuit-level testing and support functions included in special access and available as an option under Article 7. We find no basis in the record for concluding that differences in responsibility or availability of circuit-level testing constitute a material functional difference between the two arrangements.

**ii. Provisioning and Design**

78. The BOCs also assert "that the operating company performs no design or engineering activities for a SNFA facility in conjunction with its lease of capacity. Such functions, essential to the integration of network transmission and other equipment into a communications channel, remain the responsibility of AT&T." BellSouth Reply at 25. *See also* NYNEX Reply, Attachment C at 2-4. AT&T similarly states that "[i]n utilizing SNFA facilities for various service offerings, AT&T must design, test, engineer and integrate each piece of the facilities. By contrast, special access service includes all the engineering, design and testing required to establish connectivity between the circuit endpoints, including the use of appropriate electronics at each end." AT&T Supp. Direct Case at 16. *See also* Ameritech Reply at 31-32; BellSouth Reply at 13-17, 24-25; NYNEX Reply at 26-28; PacTel Reply at 5-6.

79. These functions are undoubtedly important ones for the installation of channels where AT&T owns only piece parts, or for the provision of service to end users, where the local facilities must be mated with facilities extending to the POP to achieve relevant performance standards. But the record provides no indication that these functions, to the extent they were needed, were unavailable for complete SNFAs. Most SNFA facilities were already designed and in place at the time of divestiture, and the BOCs performed acceptance testing for SNFA facilities installed after that date. They are also responsible for maintaining the functioning of the facility between the two circuit endpoints under SNFA. Because SNFA facilities are only midlinks in AT&T's own network, any further design and integration would appear to be AT&T's responsibility whether the midlink is provided under SNFAs or as special access. For example, the only evidence AT&T cites of a difference in design, engineering, and integration support concerns its responsibilities for piece- part facilities.[47] Moreover, AT&T could and in some cases did obtain these functions under Article 7. NYNEX Reply, Attachment C at 4 n.3. Based on this record, we conclude that differences in provisioning and design between SNFAs and special access were not material functional differences.

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[46] NYNEX explains that while MCI is correct that a facility is tested and maintained in the same manner whether it is used for SNFA, special access, or some other purpose, this is not the case of service level testing and maintenance.

> At the service level, [the NYNEX companies] periodically test special access services to evaluate loss, noise, and balance. If variance is found, additional tests are run to determine its cause. Maintenance, including rearrangements, is performed to correct the variance. After trouble clearing, further tests ensure that the service is within acceptable limits. Here, the [NYNEX companies] are actually testing and maintaining the quality of the transmission, as opposed to the transmission facility. This level of testing and maintenance is not performed on SNFA facilities.

NYNEX Reply, Attachment C at 6-7.

[47] AT&T mentions this issue only in its supplemental direct case where it cites in support paragraph 4 of an Affidavit by an AT&T District Manager. That paragraph states:

> *In using the piece-parted SNFA Facilities* service offerings, AT&T is responsible to design, test, engineer, and integrate each piece of the facilities. Accordingly, AT&T considers SNFA facilities as part of its own network. Special access services, however, include all engineering, design and testing required to establish connectivity between the circuit's endpoints, including the appropriated electronics at each end.

Affidavit of E. Guida at 2-3 (emphasis added).

**4. AT&T's Perception of "Likeness"**

80. MCI and AT&T also dispute whether AT&T perceived transmission SNFAs and special access to be "like." MCI cites internal AT&T planning documents that consider special access as an "alternative" to SNFAs, and that indicate that the choice between SNFAs and access service "should be based upon economic analysis techniques.[48] MCI argues that AT&T personnel followed these directives in choosing to use SNFAs and in avoiding the purchase of equivalent tariffed access services because SNFAs were much cheaper. MCI Opposition at 20-29.

81. AT&T responds that the evidence shows in fact that it "was compelled to enter into SNFAs at divestiture because its interexchange network could not immediately be separated from the BOCs facilities." It contends that it did not perceive SNFA to be "like" special access, and that "the primary 'alternative' to SNFA was the use or construction of AT&T-owned facilities." AT&T Reply at 32 (footnotes omitted). SNFAs are characterized as temporary sharing arrangements that have been difficult and expensive to administer, arrangements that AT&T has sought to terminate as quickly as it could arrange other facilities. AT&T asserts that it considered the possibility of obtaining transmission facilities from the BOC as a replacement for SNFAs only in those situations where the construction of AT&T facilities was not economic or was subject to time constraints. "[T]he limited potential overlap between SNFA and special access does not make SNFA and special access like service,'" according to AT&T, "any more than the peripheral overlap between MTS and private lines makes them 'like' services." *Id.* at 35.

82. The BOCs agree that AT&T perceived SNFAs to be functionally equivalent to AT&T-owned equipment or new construction, not SNFAs. PacTel Reply at 9-11; NYNEX Supp. Direct Case at 34. The BOCs also contend that MCI misplaces its reliance on AT&T's planning document, arguing that this document shows that cost was one of many considerations, not that it was the only consideration as MCI argues. BellSouth Reply at 33-36; PacTel Reply at 13-14; Southwestern Bell Reply at 6-9. Southwestern Bell asserts that AT&T's planning document was written two years before special access became available, and approximately six months before the Master SNFA agreement was finalized. Southwestern Bell argues that it was not possible for AT&T to perceive special access and SNFAs as functionally equivalent at a time when neither was in its final form. Southwestern Bell Reply at 9-11. Some BOCs argue that the concept of customer perception is inapplicable in this case, because AT&T was never faced with a choice between SNFAs and special access. This is because AT&T was ordered to enter into SNFAs by the Court in the Bell System divestiture proceeding. NYNEX Reply at 42-44; PacTel Reply at 9-11. Ameritech asserts that whatever choice AT&T did have was limited to facilities that were shared at the time of divestiture. Ameritech Reply at 10-13.

83. As our analysis of the piece-part nature and the various geographical and legal restrictions on most SNFAs indicates, AT&T's description of the overlap between SNFA and special access as "peripheral" is accurate. In only a small percentage of cases were special access and SNFAs alternatives in meeting AT&T's needs for transmission capability. The evidence also indicates, however, that in this subset of cases there was little or no functional difference between the two arrangements. The same facilities could be used and the same transmission capability could be provided under either SNFAs or special access.[49]

84. Here as in other discrimination cases, customer perception is an important indicator of whether two arrangements are functionally equivalent, and thus "like." But AT&T's claim that it did not perceive SNFAs and special access as "like" is unpersuasive for the limited area of complete intraLATA transmission SNFAs. The various differences in terms and conditions did not prevent the SNFAs from serving the same transmission needs as special access. AT&T's theory that SNFAs are special access are not "like" because it replaced SNFAs with its own facilities, not special access, also fails to establish that the two options for use of BOC transmission capability were not "like." All three might be functionally equivalent and AT&T's decision to acquire its own facilities could simply embody a calculation that this was the least costly of the three alternatives or had advantages other than the functions each provided.

**5. Final and Tentative Conclusions: The Extent to Which SNFAs Have Been "Like" Special Access**

85. We conclude that intraLATA Articles 3 and 4 SNFAs that have provided complete transmission paths to AT&T, including both the transmission facilities and necessary central office electronics, are facilities that are the functional equivalents of special access and that, along the specific routes where available, those SNFA facilities have thus been "like" special access. The difference cited by AT&T and the BOCs either did not exist or have not been shown to be material functional differences. The record in this proceeding is adequate to reach a final determination on this definition issue.

86. However, the question of how many SNFAs are "like" under this standard is not clear in the current record. None of the parties has offered an adequate description of the SNFAs that allows a straightforward application of this definition. AT&T and the BOCs apply invalid tests to claim that none are "like" and supply incomplete information on interLATA and piece-part SNFAs, while MCI erroneously includes numerous "unlike" SNFAs in its study. We believe our own analysis of the SNFAs is based on a reasonably-drawn sample and an appropriate method for distinguishing between "like"

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[48] "The AT&T Network Transition Strategy -- A Planning Model 1984-1990" at 7, *cited in* MCI Opposition at 20-21.

[49] In two instances in Illinois, for example, AT&T requested temporary increases in capacity under SNFAs beyond its annual forecasts. Illinois Bell responded that AT&T was not entitled to the increase in capacity under the Master SNFA, but that its transmission needs could be met in both cases by special access. MCI Opposition at 27-28; AT&T Reply at 40-42. The only significant difference would have been the billing, not the facilities or services provided. While AT&T is apparently correct to point out that the situations show the difficulties AT&T encountered in dealing with the contractual limitations on SNFA facilities, those same situations also provide persuasive evidence that the two arrangements were functionally equivalent in at least some cases.

and "unlike". Our conclusion that at most 1647 SNFAs or 18.4 percent of all BOC transmission SNFAs are "like" special access is, we believe, valid and reasonable.

87. We recognize, however, that the parties have not had an opportunity to examine the methodology or its findings. It may also by possible to refine the analysis and improve the results, for example by additional record evidence on the precise number of interLATA and piece-part SNFAs. For these reasons we present our calculations of the number of "like" SNFAs only as a tentative conclusion, subject to the further proceedings described at the conclusion of this Order.

**B. Issue Two: Whether the Special Access Tariffs Are Discriminatory in Comparison to Rates for "Like" SNFAs**

88. The second stage of the analysis prescribed by the Court in the *SNFA Remand Order* requires us to "assess amounts paid under the two pricing schemes to determine whether some tariffs are discriminatory by comparison with their SNFA counterparts." 872 F.2d at 1307. The BOCs and AT&T in their direct cases primarily assert that the two pricing schemes are so different that no meaningful comparison is possible. MCI disputes this by calculating the special access rates AT&T would have paid for channels equivalent to SNFA facilities, an analysis that includes many SNFAs that we have tentatively concluded are not "like" special access. The BOCs and AT&T criticize MCI's study in their replies, but provide no alternative method for rate comparisons. NYNEX does offer its own calculation of the rates that AT&T would have paid under special access for the intraLATA POP-to-POP SNFAs in its region, and concludes that SNFAs were more expensive than special access service. MCI submits corrections to some of its specific SNFA rate examples in its further opposition, but otherwise defends its rate comparisons as fair and accurate.

89. In this section of the Order, we first examine the respective methodologies used to develop charges for SNFAs and special access. Although this was not an issue of concern to the Court, we believe it provides useful background. We then evaluate the disputed claims of specific rate differences.

**1. Computation of SNFA Charges**

90. The SNFA charges are computed in accordance with the Costing Manual incorporated in the Master SNFA. The premise of the Costing Manual is that all costs of the shared facility are shared on the same basis, whether ownership was assigned to AT&T or the BOC. Billing is based on the actual booked costs of the particular facility and the requested capacity, as if each party were a joint owner of the facility.

91. The determination of costs under the Costing Manual is based on amounts reported on Monthly Reports in accordance with the Commission's Uniform System of Accounts (USOA). The costs include:

1) Investment Related Costs (return on net investment computed at the Owner's cost of capital, taxes, and depreciation);

2) Primary Costs (direct labor, departmental line supervision, departmental expenses, staff support, operating rents, outside vendor's contract costs);

3) Overhead Costs (such as social security, relief and pensions, general expenses, insurance, accidents and damages, general services and licenses (or equivalent), and other expenses); and

4) A Float Charge (to approximate the return on working capital after taxes).

92. The costs in each of these categories are computed and allocated to each shared facility through the costing methodology provided in the Costing Manual. After determining the statewide total booked amount for each category of expense appropriate to the facility under contract, various adjustments are made to exclude such items as revenues and payments for custom work not associated with shared multifunction facilities. The resulting expense amounts are determined by applying the ratio of the gross contracted investment by account, by contract location, or by state, to the statewide total investment in the same category of plant. For expense-intensive operations, the allocation ratio is based on labor hours or relative use. The overhead costs are allocated based generally on a wage component factor. The Float Charge is added to provide for the return on working capital after taxes. The Investment Related Costs, Primary Costs, Overhead Costs, and Float Charge are added to compute the total, fully allocated cost of the facility.

93. The actual SNFA charge is then computed based on the non-owner's forecasted share of the particular facility. The non-owner is billed on a monthly basis for costs that were incurred the prior month. The non-owner is provided monthly with the underlying investment, expense, and usage data required to make the jurisdictional allocation of amounts that have been charged to it. The billed company debits such amounts to its accounts while the billing company excludes such amounts from its accounts for separations. Intercompany Contract Administrative Centers (ICAC) were established to ensure that the amounts calculated for billing are consistent with contract terms and that the associated record keeping and billing processes are performed correctly.

94. The actual SNFA charge is then computed based on the non-owner's forecasted share of the particular facility. The non-owner is billed on a monthly basis for costs that were incurred the prior month. The non-owner is provided monthly with the underlying investment, expense, and usage data required to make the jurisdictional allocation of amounts that have been charged to it. The billed company excludes such amounts from its accounts for separations. These SNFA costs and revenues are neither recognized nor used in computing access rates. Expenses billed and rent revenues received in connection with shared use of multifunction facilities are excluded from the jurisdictional separation processes of the owner and reported separately to the Commission by BOCs and AT&T.

**2. Ratemaking Used in Special Access Tariffs**

95. Computation of special access rates is governed by

Part 69 of the Commission's Rules.[50] Actual costs are booked according to the Commission's Uniform System of Accounts (Part 32), and next flow through the jurisdictional separations process (Part 36) which allocates investment, expenses, revenues, taxes, and reserves between the state and interstate jurisdictions. Thereafter, Part 69 provides for the apportionment of interstate net investment and interstate expenses among the interexchange category, the billing and collection category, and the various access elements. These elements are intended to reflect the cost of various specific switched access services and of the separate group of dedicated facilities provided by special access.

96. The allocation of investment between switched and special access accordingly reflects the equipment and facilities used by each. In some cases, switched and special access each use a portion of a class of facility and costs are therefore shared based upon relative use. Facilities used wholly for one service are, by contrast, directly assigned.[51]

97. On the expense side, the Part 69 rules apportion to special access a part of all interstate access expenses except equal access expenses, universal service fund expenses, and lifeline assistance expenses. Part 69 directly assigns to the Special Access category the expenses of end user service order processing, payment and collection, and billing inquiry expenses attributable to the company's own interstate private line and special access service, and TWX service. Also, the expenses of IXC service order processing, payment and collection, and billing inquiry expenses attributable to private lines and special access are directly assigned to the Special Access category.

98. The Rules do not specifically allocate costs within the special access elements to the wide range of special access services and features. Section 69.114(d) of the Rules directs generally that "charges for individual subelements shall be designed to reflect cost differences among subelements in a manner that complies with applicable Commission rules or decisions." The BOCs' special access rates are based on projections of these costs and demand for the annual access period. The BOCs may also file adjustments to their rates at other times.

99. Part 69 apportionments generally reflect broad functional categories. Investment in subscriber lines is assigned to the Common Line element. Investment in end office or local switches is usually assigned to the Local Switching element. Investment in transmission facilities that carry switched traffic between switches is assigned to the Transport element. Investment in the access portions of private lines and WATS access lines is assigned to the Special Access element. Expenses such as maintenance and depreciation that can be directly associated with particular facilities are assigned to the appropriate element. Other investment and expenses that cannot be attributed to a particular element are allocated among elements in accordance with formulas specified in the Part 69 Rules.

100. Charges are usually derived by dividing a projected revenue requirement[52] by projected demand quantities. The Special Access element, however, encompasses several special services as well as voice-grade private lines, which are described as "subelements" in the Part 69 Rules. The Part 69 Rules do not prescribe an allocation of costs among these subelements. Section 69.114(d) of the Rules directs that "charges for individual subelements shall be designed to reflect cost differences among subelements in a manner that complies with applicable Commission rules or decisions." The BOCs' special access rates are based on projections of costs and demand for the annual access period; the BOCs may also file adjustments to their rates at other times to reflect revised projections.

**3. Comparison of SNFA and Special Access Rate Methodologies**

101. A comparison of SNFA and access pricing methodologies reveals that the different methodologies will rarely, if ever, produce identical effective midlink prices in the same place at the same time. An examination of those pricing procedures also reveals that the coexistence of these procedures has probably produced hundreds of individual rate disparities during the course of this investigation. Moreover, those rate disparities have varied from place to place and month to month. Because of the different pricing methods, which are applied to facilities whose costs are developed in different ways, an examination and comparison of the methodologies alone cannot reveal the aggregate magnitude of the disparities.

102. The methodologies used for SNFA contract costing and special access tariff ratemaking are based on the same underlying costs as booked under the USOA. However, the two pricing methods were designed to serve different purposes and to solve different allocation problems, and there are significant differences between them. The costs used for SNFA contract billings are historical costs. Charges for SNFAs are determined based on the owner's prior month's actual booked costs for a particular facility. These actual booked costs are divided as if the owner and non-owner were joint owners of that particular facility. The non-owner may use the facility for any type of traffic, interstate or intrastate, switched or dedicated private line. Thus, under SNFAs, the allocation of costs between AT&T and the BOC is based on the full or unseparated booked cost of the facility.

103. In the case of special access, book costs are first separated between the jurisdictions. Then the total interstate allocation is allocated under Part 69 between interexchange and access; then within access between

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[50] The discussion here describes rate of return regulation, which governed special access ratemaking during the period from March 1985 through December 1990. Since that time, special access rates have come under price cap regulation. *See* Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990), and Erratum, 5 FCC Rcd 7664 (1990), *modified on recon.* , 6 FCC Rcd 2637 (1991), *petitions for review pending sub nom.* Public Service Commission of the District of Columbia, No. 91-1279 (D.C. Cir. filed June 14, 1991).

[51] For example, special access receives an apportionment of part of the investment in IOT equipment, C&WF, COE Category 4 Circuit Equipment, general support facilities, other investment, capital leases, the investment in property held for future telecommunications use, telecommunications plant under construction-short term, and Commission- allowed telecommunications plant adjustments. *See* Sections 69.303-307 of the Commission's Rules. Special access is directly assigned the investment in interstate and foreign private lines and interstate WATS access lines. Section 69.304(b) of the Rules.m

[52] The revenue requirement is projected as follows: (authorized or target rate of return * allocable net investment) + allocable expenses.

switched and special; then within special to the rates for individual special access services. Each of these additional steps in the allocation process is necessary to derive rates that fairly reflect costs. However, each additional step inevitably affects the end results in ways that blur any comparison with SNFAs. For example, Section 69.305 allocates carrier cable and wiring facilities by first deleting the interexchange category. This category is the one most comparable to SNFAs. The rule then assigns remaining facilities to the switched access transport element if they are receiving local exchange switching, with the exception of WATS lines. WATS lines and all remaining facilities are assigned to the residual classification, special access. Because special access is used for WATS and other dedicated exchange facilities, this allocation should produce a reasonable allocation of costs to the interstate special access element, and the BOCs were required to follow it. But it is not likely to produce the same result as the SNFA methodology.

104. The Special Access rates are also based on an estimate of future costs. Those estimates are used to compute the annual revenue requirements which, in turn, determine the tariff rates to be charged. These estimates will inevitably differ somewhat from actual results.

105. Another difference is that SNFA costs are usually identified with a specific facility being leased. Costs for each SNFA can vary widely due to variations or fluctuations in the maintenance and other expenses incurred by the owner. Thus, SNFA charges may vary widely from month to month. Special access tariff rates are based on averaged costs for a yearly period. Unlike SNFA charges, the monthly tariff charges for Special Access do not fluctuate from month to month unless there is a change in service ordered or a change in the tariff rates.

106. Another difference is in the respective rates of return. The return component of SNFAs is computed from the owner's actual cost of capital. The rate of return allowed for special access, by contrast, is prescribed by the Commission, though the BOC may not achieve that amount in fact.

107. For the most part, SNFAs and special access recover the same categories of costs, but there are some exceptions. The cost allocation methodologies, for example, reflect the further distinction that special access provides an integrated end-to-end service, but Article 3 and 4 SNFAs do not. Thus, the costs included under Article 3 and Article 4 SNFAs are not so extensive in scope as the costs that are included under Special Access. Article 3 and Article 4 SNFAs do not include the expenses for equipment, support, and testing on SNFA transmission facilities that AT&T itself carries out (or obtains under Article 7). While the owner of a SNFA facility provides the facility level support for the specific facility being leased, the owner does not provide service level support (service level provisioning, design, testing, and maintenance). Since its SNFAs do not include this service level support, AT&T has to provide its own service level support or obtain Article 7 SNFAs at additional costs. This service level support is provided to all customers of special access.[53]

108. In addition, special access services include the expenses of marketing and such operations as customer contact operations, and service order processing, none of which is provided in connection with SNFA facilities. SNFA cannot usefully be marketed to AT&T because it cannot order new facilities under SNFA, and can only marginally adjust quantities. SNFA also uses separate procedures and systems for lessee-contracts and billing that are not comparable to the tariff-based special access services.

109. None of the parties in this proceeding raise any objection to the cost allocation methodologies used for SNFAs and special access. We have reviewed the SNFA cost allocation process and it appears to represent a fair method to accomplish its purpose: to share the actual costs of operational interexchange facilities that are used for both switched services and as dedicated facilities. Exclusion of marketing costs and certain operations not used for SNFAs appears reasonable in this case, as does the use of cost of capital to set the return component. We also continue to believe that the cost allocation process established by the separations and access rules represent a reasonable method of allocating interstate costs to special access, a set of services using primarily exchange facilities. The wide diversity of special access services and features also militates against establishing specific costs allocations to the particular special access services obtained by customers. Because of the major differences in purpose and approach, however, the two processes cannot be expected to produce rates that are similarly structured, or even easily comparable.

**4. Rate Comparison Methods and Estimates of Rate Disparity**

110. The BOCs and AT&T argue that the differences between SNFA and special access pricing described above are so different that no meaningful comparison of their charges can be made. It warrants emphasis that the carriers providing special access service and counterpart SNFA facilities to AT&T bear the burden of demonstrating the just, reasonable, and not unreasonably discriminatory nature of the rates under investigation.

**a. MCI's Rate Comparison**

111. MCI contends that the charges can be compared, and that AT&T obtained SNFAs at much lower charges than for equivalent capacity it could have obtained through special access. MCI claims that it has analyzed the amounts paid by AT&T for Article 3 and Article 4 transmission facility SNFAs from May 1985 through March 1989, which it claims totalled $402 million. It also computes equivalent special access tariff rate charges, which it claims were $2.391 billion, a differences of $1.989 billion. In Volume II of the Appendices to MCI's Opposition to Supplemental Direct Cases, MCI provides a description of the methodology used to complete this analysis, and a summary of the results obtained, as well as seven examples of individual SNFA schedule comparisons to special access charges. MCI had the accounting firm of Price Waterhouse review all the data input and verify with 95 percent

[53] These Article 7 SNFAs were substantial, totalling over $200 million for AT&T, but it is difficult to estimate the portion of this used to support Article 3 and 4 facilities. AT&T also used Article 7 SNFAs to support its own facilities.

confidence that errors in coding of lease or billing data or errors in tariff calculations account for no more than 5 percent of the difference between the amounts billed to AT&T and the corresponding tariff rates. A detailed review of the MCI comparison undertaken by the Commission's staff, however, discloses significant calculation errors as well as several methodological flaws.

**(1) Calculation Errors**

112. The staff has studied the seven examples (one for each BOC region) which MCI says illustrate the method of calculating the $1.989 billion difference in charges.[54] For the original seven examples the total SNFA billing was $474,669 and the total tariff cost calculated by MCI was $2,918,698. In the original seven examples the alleged SNFA savings were $2,444,029 ($2,918,698 - $474,669). However, the original seven examples included numerous calculation errors, and MCI filed revisions for all seven examples.

113. The corrected amounts filed by MCI in its further reply changed the total SNFA billing for the seven examples to $452,924 and changed the total calculated tariff cost to $1,999,623. The corrected SNFA savings total alleged for the seven examples thus is $1,546,699. This was a decrease of $897,330 or 36.7 percent from MCI's original alleged SNFA savings. Nevertheless, MCI still maintains that the figure of $1.989 billion remains valid. Yet if the original seven examples MCI handpicked to display its methodology are so riddled with errors, there is a sound basis to question the accuracy of the other calculations underlying the claimed $1.989 billion difference notwithstanding the efforts of MCI's accounting firm. Efforts that have failed to identify undisputed errors of this magnitude may simply be inadequate to verify the complex procedures involved.

**(2) Methodological Flaws**

114. Even assuming that errors are limited to its selected examples, there are numerous flaws in MCI's methodology. We have evaluated the overall industry analysis and each of the seven examples, and detail our modifications and reasons for them in Attachments E and F of this Order. In light of the corrections we make to the MCI study and the failure of the BOCs and AT&T to provide any alternative to the study, the conclusions we reach regarding price discrimination for like services are tentative, and are subject to further consideration in light of supplemental evidence and analysis provided by the parties to this proceeding.

**i. Differences associated with "unlike" SNFAs**

115. MCI's study assumes that 92.6 percent of transmission SNFAs are "like" special access. However, MCI's total includes many interLATA and piece-part SNFAs that we have concluded are not "like" special access. Assuming that our tentative conclusion is correct that only 18.4 percent of transmission SNFAs are "like", MCI's analysis appears to overstate any rate differences between special access charges and "like" SNFAs by more that 400 percent. If we make corrections to MCI's calculations, as outlined below, and assuming that MCI computed equal differences in rates between "like" and "unlike" SNFAs, this adjustment would reduce the relevant rate differences to about $394 million.

**ii. Terminated SNFAs**

116. MCI's computation of the total disparity in charges during the study period assumes that all SNFAs remained in effect for the full four year period of its study at the same level of usage. In fact, AT&T terminated most of its SNFAs by the end of the study period and had reduced its usage in other cases.

117. We required AT&T and the BOCs to file billing information stating the total billings for all schedules under each of the SNFA articles for each of the years 1985, 1986, 1987, and 1988 for each state and for the life of the contracts. Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, DA 89-522, released May 9, 1989 (Com.Car.Bur.) at para. 29. (*Second SNFA Filing Order*). Based on this data, we were able to determine whether and when each Article 3 SNFA terminated, and from this derive a rate of abandonment of SNFA facilities. To the extent MCI's study assumes that all SNFAs remained in effect, MCI obviously overstates the amount of any rate difference. Our study of SNFA terminations found that about 12.6 percent of SNFAs terminated in 1985, 18 percent terminated in 1986, 20.8 percent terminated in 1987, and 24.5 percent terminated in 1988.

118. In total, between May 1985 and March 1989, some 75 percent of SNFAs were terminated. Applying an equal markdown to the $394 million attributable to "like" SNFAs under MCI's analysis would reduce the relevant rate difference to about $260 million. The number of SNFAs which were in effect until the end of 1991, the time any transmission SNFA contracts remaining in effect expired, was of course far smaller, since terminated SNFAs cannot be reinstated.

**iii. Channel Terminations**

119. MCI also overstates the number of channel termination charges that AT&T would pay if it replaced SNFAs with special access. MCI asserts that SNFAs are "multi-use transmission facilities capable of carrying both switched and special access services." MCI Opposition at 54 n.119. MCI contends that each SNFA facility providing a transmission path between two designated points is equivalent to two special access circuits: one circuit carrying switched and special traffic between two POPs, and one circuit to complete the transmission path from the end user to the closer POP. *Id.* MCI concludes that the applicable charges for the two special access circuits it claims to be equivalent to one SNFA would include four channel termination charges. *Id.*

[54] The results of the study of MCI's seven examples are set out in detail in Attachments E and F of this Order. The staff also examined the two SNFAs NYNEX identifies as the only intraLATA POP-to-POP SNFAs in New York State. The results of this examination are set out in Attachment H of this Order.

120. This assumption seems unreasonable. A transmission path provided by a SNFA midlink facility and a special access endlink would be replaced by one longer special access circuit, not two separately-ordered facilities. AT&T could purchase one channel from the end user's premises to the more distant AT&T POP location and incur only two channel termination charges. Furthermore, MCI concedes that SNFA facilities could be replaced with special access service with two channel termination charges. *Id.* Moreover, as AT&T and the BOCs point out, the channel termination element in special access service recovers the costs of facilities from the customer premises to the local end office. Since SNFAs do not include the facilities associated with this endlink, it would be inappropriate to include these channel termination costs in a SNFA and special access rate comparison. BellSouth Reply at 38-39; PacTel Reply at 20-21; AT&T Reply, Attachment A at 1-2. MCI notes that if its assumption is changed, the alleged disparity is reduced by 68.8 percent (from $1.989 billion to $621 million). MCI Opposition at 57 n.123. The lower amount represents alleged savings in SNFA charges as compared with the distance-sensitive channel mileage subelements in special access.[55] Applying this adjustment to MCI's calculations reduces the $260 million difference computed at the last stage to about $81 million.

**iv. Charges for Article 4 COE SNFAs**

121. MCI does not include in its computed rate difference the charges AT&T paid for Article 4 COE SNFAs used to support Article 3 and Article 4 transmission facility SNFAs, or the optional charges AT&T paid under Article 7 for testing and support. MCI calculates an adjustment for COE of 15.6 percent ($313.9 million out of $1.989 billion) but does not include this adjustment in its computed rate difference on grounds that the limited information provided by the BOCs prevents an accurate assignment of Article 4 COE SNFAs between those used to support Article 3 and Article 4 transmission SNFAs and those used for AT&T-owned facilities. MCI Opposition, Vol. II, Tab B.

122. Inclusion of Article 4 COE and Article 7 charges seems necessary for any meaningful comparison of transmission SNFAs with special access services that include provisions of these functions. Even though the record in this proceeding contains no indication of the exact amount AT&T paid for Article 4 COE SNFAs and Article 7 SNFAs used solely to support Article 3 and Article 4 transmission facility SNFAs, we believe a reasonable allowance for the amounts paid should be included in the comparison since these services are included in the price of special access service. According to MCI, AT&T paid $313.9 million for all SNFA lease charges for central office equipment. However, this $313.9 million represents SNFA lease charges used to support *both* AT&T's own transmission facilities and all its Article 3 and Article 4 transmission facility SNFAs. Under Article 7 AT&T paid the BOCs approximately $220 million for support and testing on transmission facilities. This includes support and testing on transmission facilities AT&T obtained under Article 3 and Article 4 as well as its own transmission facilities. The estimated $220 million does not, however, include the cost of using AT&T- owned systems and centers used to provide support and testing of SNFA facilities.

123. The $313.9 million cited by MCI thus represents amounts paid for support of facilities AT&T obtained under Article 3 and Article 4 as well as its own facilities, but there is no hard evidence of the proper allocation. Given this situation, we believe a reasonable assumption is that AT&T's Article 4 COE usage would be almost exclusively for other shared facilities. About 57 percent of the SNFAs are for BOC-owned facilities.[56] We therefore tentatively conclude that a reasonable allocation would assign 57 percent of Article 4 COE charges to BOC SNFAs, or about $180 million.

124. Article 7 charges present an additional problem. It is not stated in the record how often AT&T obtained optional Article 7 support functions, and how often it provided them itself. Thus, the total Article 7 amount includes charges associated with AT&T-owned facilities, but also excludes costs incurred by AT&T itself to provide functions needed to make transmission SNFAs equivalent to special access. For purposes of the present calculation we believe it is reasonable to assume these two factors offset each other, and use the $220 million figure as the most reasonable adjustment available. The total effect of these two adjustments is thus approximately $400 million ($180 million + $220 million).

125. This amount may in fact be conservative, given Ameritech's statement that in 1985 alone AT&T paid $20.7 million for such activities as circuit design, end-to-end alarm functions, and remote testing capabilities. Given that there are seven BOCs and the MCI study covered a four-year period, the actual amount paid by AT&T, and actual costs incurred, may be higher. See Attachment E, Table 1. This figure must be adjusted to remove costs attributable to "unlike" and terminated SNFAs. Applying our tentative conclusion of the percentage of "unlike" SNFAs (81.6 percent) and terminated SNFAs (an average of 33 percent reduction in SNFA charges during the 4 year period of MCI's study) implies a reduction in MCI's completed rate differential of about $47 million. The net rate difference, including these and the other adjustments we have discussed, yields a rate disparity of about $34 million ($81 million-$47 million).

**v. Other Adjustments**

126. We believe other errors exist in MCI's assumptions and methodology which, if quantified, would further reduce, if not eliminate completely, MCI's alleged cost variance. Errors in MCI's assumptions and methodology which we were unable to quantify are the following:

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[55] For a SNFA used for both switched and dedicated traffic, AT&T would also be assessed only two channel terminations for a replacement special access POP-to-POP facility. It would pay additional switched access charges for the endlink, based upon the minutes of use.

[56] *See* Section II, *supra*.

-- MCI's study assumes that AT&T would purchase only expensive voice grade channels or simple DS1 special access service. The study fails to consider the savings that could be realized by purchasing higher capacity access.

-- MCI's study fails to include the costs of re-engineering and rearranging SNFA circuits AT&T incurred as a result of the limited duration and eventual elimination of SNFAs. According to AT&T, these costs are greater than $90 million.

-- MCI's study does not include AT&T's cost of developing and implementing the new Mechanized Intercompany Contract Administration (MICA) billing system for the SNFAs or the Intercompany Contract Administration Center (ICAC) organization that AT&T was required to set up to administer the SNFAs. According to AT&T, the costs of the ICAC organization and the development and operation of MICA amounted to $60 million for the period April 1985 through March 1989.

127. Given the lack of record evidence, it is difficult to assign any specific amount to these factors. No data is presented on the availability or rate levels for other special access services from which to quantify any narrowing of the differential. Similarly, the stated re-engineering charges are totals and do not necessarily represent increased charges incurred because SNFA were used rather than special access: similar costs might have been incurred in replacing special access with AT&T's own facilities. Finally, the administrative costs associated with AT&T's own SNFAs are included in the totals, but of course are not relevant to a comparison of the charges for BOC SNFAs.

**b. NYNEX Rate Comparison**

128. NYNEX performed a study of all Article 3 and 4 SNFA leases which cover facilities connecting two AT&T POPs located in the same LATA. These leases arguably could have been replaced by special access services. NYNEX's study claims that the SNFA charges paid by AT&T were $1.9 million *more* than the additional special access charges AT&T would have paid in the absence of the SNFA leases. MCI did not challenge this study in its Supplemental Reply.

129. The NYNEX study compares SNFA charges for those POP-to-POP channels to the charges that would have been imposed on AT&T for the incremental channel mileage subelement of a hypothetical special access service of equal distance. NYNEX's methodology excluded channel terminations, which is appropriate for reasons we have already discussed (*supra*, paras. 119-120). Because NYNEX did not file a copy of its detailed cost comparison study for the 24 SNFAs, we are unable to comment on all of NYNEX's calculations. However, we selected two of the SNFAs for study (NYT SNFA 13424 and NYT SNFA 13426). For SNFA 13424, the computed charges under special access tariffs were $6,382 while AT&T was billed $94,676 under the SNFA, a difference of over $88,000. For SNFA 13426, special access charges would have been only $17,274.81, but AT&T was billed $46,659 - a difference of over $29,000. (*See* Attachment H). Based on this analysis there is support for NYNEX's contention that for its POP-to-POP SNFAs the actual SNFA charges were more than if AT&T had obtained these facilities under special access tariff.

**5. Tentative Conclusions**

130. Due to its methodological flaws, exclusion of relevant SNFA costs, and inclusion of SNFAs that are not "like" special access, MCI's study appears to grossly overstate any rate difference between SNFAs and special access facilities. Neither AT&T nor the BOCs other than NYNEX, offered alternative studies for our consideration. Therefore, we use MCI's study as a starting point, but make adjustments to correct errors. Accordingly, we tentatively conclude that, after making appropriate adjustments, MCI's study indicates a rate difference of about $34 million over four years, or about $8 million per year from 1985 through 1989. This is a proportionately minute amount in comparison with overall charges for SNFAs and special access. In 1986 alone, for example, AT&T reported total interstate SNFA payments of $384 million and total interstate special access payments of $2.62 billion. *See* AT&T Tariff Filing Reference Package, Vol. 2, 1986 Annual FDC Reporting Schedule 200, Items 657-13 and 23, Schedule 205, Item 671.

131. While MCI's study of individual BOC examples does appear to show some rate differences, it is unclear that those handpicked examples are representative. Moreover, the study contained numerous computational errors and MCI's assertion that similar errors did not occur in the industry-wide calculation is not persuasive, since the individual BOC examples were proffered as the sole examples of the larger analysis.

132. NYNEX's analysis of the 24 intraLATA POP-to-POP SNFAs in its region appears to compare the actual difference in charges incurred by AT&T in using "like" midlink SNFAs and special access midlinks, rather than complete POP-to-customer special access. As confirmed by our examination of the alternative charges, the specific examples thus indicate that, at least in some cases, SNFAs were significantly less expensive than equivalent special access. However, this analysis does not include POP-to-end office SNFAs, and may not be representative of the other BOCs. The NYNEX methodology could serve as a useful model for BOCs who wish to develop studies responsive to the MCI demonstration, but in its present form it lacks the scope necessary to support an alternative estimate of the aggregate rate disparities involved.

133. The burden of proof on this issue rests with the BOCs. (*SNFA Remand Order*, 842 F.2d at 1307. Section 204(a)(1) of the Communications Act.) They also of course have the best access to the data needed to compare their own charges. Except for NYNEX's study of POP-to-POP SNFAs, which cannot be extrapolated to other facilities or BOCs, the BOCs have presented no significant evidence showing the actual rate differences between special access and "like" SNFAs.

134. In sum, while MCI's studies contain significant errors, we tentatively conclude that after correcting for those errors MCI has presented some evidence that SNFA lease charges were lower than equivalent rates for "like" special access channels, both overall and in some but not all specific cases.

**C. Issue Three: Whether the Differences in Charges Between "Like" Transmission SNFAs and Special Access Are Unjust or Unreasonable**

135. Section 202(a) does not forbid all discrimination among "like" services, only that which is "unjust or unreasonable." For example, otherwise discriminatory rates may be justified by considerations such as differences in cost, or the fact that they serve the goals of the Act, as in cases where a discriminatory rate is permitted temporarily as part of a transition mechanism.[57]

136. Our analysis to this point has been to determine whether different, discriminatory prices were charged by the BOCs for the relatively small category of SNFAs that are "like" special access. For purposes of this analysis, we have largely focused on the question of whether AT&T was offered, and in fact obtained, "like" service under SNFAs at rates lower than the rates for special access. If there were no significant difference, there would be no discrimination and no need to consider issues of justification. Since we have tentatively concluded that discriminatory prices were changed between "like" transmission SNFAs and special access we now inquire as to whether the discrimination is just and reasonable.

**1. Cost Differences**

137. As we described earlier, the costs included in computing SNFAs charges differ from those allocated to special access under our Rules. The special access category includes costs of marketing and activities such as customer contract operations and service order processing, which are not relevant to the separate billing and ordering systems established for SNFA administration. In addition, of course, special access includes all the maintenance and service integration functions provided on an optional basis in Article 7 SNFAs.

138. As we also discussed, the many differences between the rate methodologies developed for the sharing of the SNFA midlinks and the tariffing of special access services comprised almost exclusively of endlinks make comparisons difficult. An approximation of the cost differences between the two cases can be derived from an examination of the overall share of special access revenue requirements attributable to activities not needed or provided in the case of transmission SNFAs.

139. To estimate this amount we have examined data filed by the BOCs showing the expenses for marketing, local business office, and other customer service expense. The data for calendar years 1988, as filed in BOC Reports 4304 on April 2, 1989, shows that these expenses totalled 6.85 percent of special access. Adjusting the rate comparison to reflect the inapplicability of those costs to SNFAs would reduce the estimated difference in rates from 36 to 31 percent, and would thus justify about $8 million of the $34 million. The remainder is about $26 million, or about $6.5 million a year from 1985 to 1989.

**2. SNFAs as a Transitional Program**

140. In our initial Order, we concluded that SNFAs were justified as a temporary, transitional mechanism. In the *SNFA Remand Order*, the Court held that we had not been in a position to declare the temporary disparities reasonable and just, because the SNFAs did not necessarily end in 1991; the termination of some unprofitable leases did not imply that others might not confer an unreasonable or unjust advantage to AT&T; we had not found that the concerns that justified transitions over a period of months in cases of rate increases applied to the maintenance of SNFAs for up to eight years; and we had not assessed the reasonableness of SNFAs in light of the magnitude of the disparity in charges. The BOCs continue to defend SNFAs on this basis, noting that some rate disparity is reasonable in transitional programs. US Sprint argues, in opposition, that SNFAs have been in existence too long to be justified as a transitional measure. Sprint Opposition at 11.

141. We have considered again whether the discriminatory SNFA rates we tentatively conclude exist here are justified on this ground, in light of the record on remand, and we tentatively conclude that, even without regard to the cost differences discussed above, they are justified as a transitional program. First, we note that while the POR approved by the District Court does not set a specific date for the termination of SNFAs, the Master SNFA does establish December 31, 1991, as the final date for transmission SNFAs.[58] It is our understanding that all transmission SNFAs were terminated as scheduled, and that this issue is therefore moot. To assure ourselves that this understanding is correct, we direct the BOCs and AT&T to specify in their supplemental comments any transmission SNFAs that remained in effect after December 31, 1991, with full information concerning the reason for the extension and the rescheduled termination date.

142. Second, we tentatively conclude that the role of SNFAs in bridging the shift from the monolithic Bell System to a fully non-discriminatory system of interstate access services justifies the low level of temporary rate discrimination that we tentatively conclude existed. The nature and length of the transition does differ in this case from other cases where transitional mechanisms have been found to justify discriminatory rates, but this is because the unique circumstances of divestiture differ. In other cases, large rate increases were phased in to allow customers to adjust to the new rates, and to avoid disruption of service. National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095, 1135-36 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985); *see also* Western Union Tel. Co. v. FCC, F.2d 1495, 1505 (D.C. Cir. 1987).

143. In the case of divestiture, the danger was that extant multifunction property might be inefficiently used or even abandoned while still useful, resulting in higher costs and a drop in the quality and availability of service. It was necessary to allow SNFAs to continue for a substantial period to allow both AT&T and the BOCs to identify their post-divestiture needs and then to plan and construct replacement facilities. These activities would naturally require a lengthy period of time, especially to allow facilities under construction to be used efficiently. But it was not necessary to establish a staged transition, as we

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[57] National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095, 1135-36 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985); *see also* Western Union Tel. Co. v. FCC, 815 F.2d 1495, 1505 (D.C. Cir. 1987).

[58] SNFAs for other facilities such as land and buildings may continue past that date. US Sprint claims it "has learned [AT&T] may very well ask the decree court to continue certain of the SNFAs beyond even these expiration dates" and requests a ruling that SNFAs be terminated by the end of 1991. *Id.* at 10 n.5. US Sprint's request also would apparently terminate non-transmission SNFAs. Any such request is beyond the scope of this proceeding.

have often done elsewhere, because the incentives created by the SNFA deadlines would themselves encourage both AT&T and the BOCs to undertake the efforts necessary to establish fully-independent networks. Because the BOCs and AT&T were given a deadline by which time they were required to end their use of SNFAs, they were allowed a period in which disruption of service was minimized; because they shared the use of the facilities based on relative shares of the costs, they were also encouraged to shift to other facilities when these were less costly, within the overall deadline. While the specific periods were chosen by the BOCs and AT&T, subject to review by the Department of Justice, the divestiture Court, and this Commission, the periods appear reasonably chosen to serve these purposes.

144. Third, we tentatively conclude that the temporary, transitional nature of SNFAs is a greater justification for the apparently small rate disparity between Special Access and SNFAs because the use of Special Access service for interLATA midlinks was unanticipated at the time of divestiture.[59] The MFJ was designed to create a world in which one set of carriers provide local services to end users and provide origination and termination of "interexchange" services to another set of carriers. Interexchange telecommunications would consist of two access tails at each end and an interexchange piece in the middle. Both the MFJ and Part 69 of the Commission's Rules were based upon the somewhat simplistic premise that access ends and interexchange begins when a transmission reaches a toll switch or some equivalent facility.[60] Local exchange carriers owned the access facilities and provided the access or origination and termination service to IXCs at tariff rates. IXCs either owned the interexchange facilities or obtained those facilities from some source other than the LECs.

145. Overall, we tentatively conclude that the interim stage of quasi-ownership embodied in SNFAs was a necessary and justified means of accomplishing those goals during the transition to complete divestiture and fully non-discriminatory access. Weighing the substantial benefits of this transition to the public against the apparently slight disadvantage to the ICs, we tentatively conclude that any discrimination was just and reasonable during the SNFA transition period.[61]

## V. ISSUES TO BE ADDRESSED IN SUPPLEMENTAL FILINGS

146. As described, the record on remand has enabled this Commission to establish a test for determining when SNFA and special access facilities are "like."

147. The record is less adequate as to other issues, and we are therefore seeking supplemental evidence on our tentative conclusions. This Commission seeks comment on (1) the general sufficiency of the record and the tentative analyses undertaken thus far to satisfy the terms of remand, and (2) possible supplemental exhibits directed to improving the record, including BOC rate comparisons. These issues are specified in more detail below. The ordering clauses provide for supplemental pleadings and replies; after evaluation of those pleadings we will determine whether to resolve the issues on remand at that juncture or to require further submissions.

148. The quantification of like service configurations presented at paras. 61-64, *supra*, is a tentative estimate necessitated by the failure of parties to provide a consistent, documented analysis of the transition SNFAs that provide complete intraLATA transmission paths and those that did not. The discussion at paras. 50-53, *supra*, describes in detail our method of review for the BellSouth SNFAs in Mississippi. Absent a more fully developed record, our tentative determination will be conjoined with the MCI study estimates of discrimination to develop final conclusions respecting the extent of like configurations and associated. Parties submitting supplemental pleadings should therefore address:

> (1) any deficiencies in the Commission's estimate method, or that of the MCI study (including adjustments tentatively determined by the Commission); and
>
> (2) possible alternatives, including Commission instructions to the BOCs to provide an adequate record for the rigorous determination of the extent of like services.

BOCs are specifically requested to estimate the time required to replicate the Commission/BellSouth method of analysis for all SNFAs affected by the terms of the investigation, using the definition of likeness determined at para. 85, *supra*.

149. As to the tentative estimate of rate discrimination, parties are requested to comment on the adequacy of the MCI study, as adjusted, to the court's instructions on remand, and to suggest alternative, supplemental procedures. BOCs are reminded that, whatever deficiencies are finally determined with respect to the MCI study, it currently represents the best evidence in the record of the extent of rate discrimination between SNFA and special access circuits. The burden of proof respecting this issue (as well as other issues in this proceeding) rests with the BOCs, and they are requested to address:

> (1) The tentative conclusions respecting MCI's study, set forth at paras. 130-134, *supra;*
>
> (2) whether the method adopted by NYNEX for rate comparisons of POP-to-POP SNFAs is sufficient to the terms of the court's remand; and
>
> (3) any alternative methods for comparably detailed rate comparisons.

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[59] The SNFA arrangement described in the Plan of Reorganization AT&T submitted to the MFJ Court and the original Part 69 rules that the Commission adopted at about the same time. Both events occurred in the winter of 1982-83 following the August 1982 court decision adopting the MFJ.

[60] See Sections 69.2 (a) and 69.2 (b) of the Commission's Rules; 47 C.F.R. §§ 69.2 (a), (b).

[61] Because the rate disparity between SNFAs and special access is apparently justified by the role of SNFAs as a transition program, we do not find it necessary to address other justifications raised by the BOCs or AT&T.

BOCs are specifically requested to estimate the time required to apply the NYNEX rate comparison method to all SNFAs that are "like" special access under the definitions determined at para. 85, *supra*.

150. As to the circumstances possibly justifying rate discrimination, parties are requested to comment on the Commission's tentative assessment of these circumstances, and the extent to which they offset the estimated discrimination. Parties asserting that the factors possibly justifying rate discrimination in this context are different than stated in the tentative findings, or disputing the tentative weight accorded those factors, should support such statements with specific explanations.

## VI. ORDERING CLAUSES

151. IT IS ORDERED that the motion for leave to file supplemental pleading, filed by MCI Telecommunications Corporation on January 12, 1990, IS GRANTED.

152. IT IS FURTHER ORDERED that AT&T and the BOCs shall file all relevant evidence and comments addressing the tentative conclusions in this Order in Second Supplemental Direct Cases no later than **March 16, 1993,** that oppositions parties shall file all relevant evidence and comments addressing the tentative conclusion in this Order in Second Supplemental Oppositions, no later than **April 16, 1993,** and that replies to the Oppositions shall be filed no later than **May 17, 1993.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT A

1. **Supplemental Direct Cases (Filed June 13, 1989)**
(cited as "Supp. Direct Cases")

American Telephone and Telegraph Company (AT&T)

The Ameritech Operating Companies (Ameritech)

The Bell Atlantic Telephone Companies (Bell Atlantic)

The BellSouth Telephone Companies (BellSouth)

The New England Telephone and Telegraph Company and the New York Telephone Company (together, NYNEX)

Pacific Bell and Nevada Bell (together, PacTel)

Southwestern Bell Telephone Company (Southwestern Bell, or SWB)

Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (together, US West)

2. **Oppositions to Supplemental Direct Cases (Filed November 13, 1989)**
(cited as "Oppositions")

MCI Telecommunications Corporation (MCI)

US Sprint Communications Company Limited Partnership (Sprint)

Competitive Telecommunications Association (CompTel)

3. **Replies to the Oppositions (Filed December 13, 1989)**
(cited as "Relies")

AT&T
Ameritech
Bell Atlantic
BellSouth
NYNEX
PacTel
Southwestern Bell
US West

4. **Supplemental Reply to the Supplemental Direct Cases**
(cited as "Supplemental Reply" or "Supplemental Opposition")

MCI

5. **Oppositions to MCI's Motion for Leave to File Supplemental Pleading**

Ameritech
Bell Atlantic
BellSouth
NYNEX
PacTel
Southwestern Bell
US West

ATTACHMENT B

The following is a reproduction of the Introduction Sections of Articles 3 and 4 of the Master Shared Network Facilities Agreement (SNFA). This is included as a description of the facilities covered by the SNFA articles at issue in this investigation. Several Bell Operating Companies and American Telephone and Telegraph Company (AT&T) provide summaries of these SNFA clauses in their supplemental direct cases. AT&T Supp. Direct Case, App. A at 2-6; Ameritech Supp. Direct Case, Att. at A-3 through A-5; BellSouth Supp. Direct Case, App. I at 13-19; NYNEX Supp. Direct Case at 14-21. Bell Atlantic and US West reproduce the Introductions of Articles 3 and 4 as Attachments or Appendices to their Supplemental Direct Cases.

ARTICLE 3

3.A.01 INTRODUCTION. This Section of the Agreement provides Standard Terms governing any cable transmission facility, network or structure that is shared by the parties pursuant to this Agreement.

3.A.02 DESCRIPTIONS OF CABLE TRANSMISSION FACILITIES AND STRUCTURES. When the facilities required to provide point-to-point transmission capability are wholly owned by one party or obtained by that party under other provisions of this Agreement, that party may provide for the point-to-point transmission needs of the other party using such Facilities on a point-to-point network capacity basis. In certain other cases, capacity shall be provided by the Owner to the Non-owner for the following five types of outside plant Facilities and structures:

a. Carrier on Cable Facilities. Carrier on Cable Facilities are Cable Base Facilities and Multiplex Slots on cable transmission Facilities conditioned for carrier transmission, or networks of such Facilities. These Facilities extend from a cable termination point in one central office to a similar point in another central office or between any other ownership demarcation points agreed upon by the parties.

Digital base Facilities consist of metallic, coaxial, or fiber cable pairs equipped with digital span regenerators (repeaters) to provide a digital transmission medium for a T1 carrier signal at 1.544 million bits per second (Mb/s), a T1C/T1D signal at 3.152 Mb/s, a T2 signal at 6.312 Mb/s, a T3 signal at 44.736, a T4 signal at 274,176 Mb/s, or any other bit rate as specified in the Schedules.

Analog base Facilities consist of metallic cable pairs or coaxial pairs equipped with analog span repeaters (K, L, N, or O repeated lines) to provide a transmission medium for analog carrier at group, supergroup, or mastergroup frequencies or any other band as specified in the Schedules attached hereto or may be agreed upon by the parties.

Base facilities may extend through intermediate central offices and do not include inside central office equipment on the office side of the office cable termination point unless specified. Apparatus cases, pole mount cabinets, and line repeaters mounted within are included.

Multiplex Slots are derived by attaching central office equipment that may be provided under and described in Article 4 of this Agreement. The Multiplex Slots provided under this Agreement are the Non-owner's portion of sub-divided base Facilities.

b. Metallic Non-carrier Cable Pairs. The cable Facilities or network of such Facilities in which capacity shall be shared are Metallic Cable Pairs with or without load coils. These pairs generally extend from the Main Distributing Frame (MDF) of one central office to the MDF of another central office, or other termination point.

c. Poles. The structures on which capacity shall be shared consist of poles or pole structures. The poles provide support for the attachment of cables, guys, wires, load coils, repeaters, terminals, radio transmitters, radio receivers and buried terminals or conduit risers. Pole lines extend Facilities from a central office or can extend from an underground conduit system, or buried cable, to another central office.

d. Conduit. The structure in which capacity shall be shared is an underground system of ducts and manholes used for placing cables and apparatus cases. A conduit system can extend from a central office to another central office, to a buried cable, to a pole line or can extend between pole lines or between cable routes.

e. Guyed Towers. The structures on which capacity shall be shared consist of towers of varying heights that are held erect by guy wires. The towers are used to support antennae, passive reflectors, and mobile radio facilities.

## ARTICLE 4

4.A.01 INTRODUCTION. This Article covers central office circuit or carrier equipment and radio transmission equipment and networks of radio transmission Facilities. Such equipment shall be contracted for by the Non- owner by multifunction accounting location.[62] The Owner agrees to provide the specified capacity to the Non-owner, set forth for each item in the Schedules. The Schedules will also designate the Centers, Systems and Facilities that support central office circuit or carrier equipment and radio transmission Facilities.

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[62] An accounting location is a particular central office location that is identified by a specific accounting number. Work areas in a particular location that are assigned to a different owner upon divestiture will be merged and assigned a new, unique accounting number.

4.A.02 DESCRIPTIONS OF THE DIRECTLY CONTRACTED CENTRAL OFFICE CIRCUIT OR CARRIER EQUIPMENT AND RADIO TRANSMISSION FACILITIES.

a. Central Office Circuit Equipment or Carrier Equipment. The central office circuit or carrier equipment covered by this Agreement is used for (1) individual circuits; (2) carrier systems; and (3) automatic maintenance-equipment access, e.g., the Switched Maintenance Access System. Included is all circuit equipment located within the boundaries of an accounting location except test boards and their associated test equipment, which are covered by separate provisions of this Agreement. The central office equipment items are location-specific and are typically contracted to provide transmission service or test functions.

b. Radio Transmission Facilities. This Article also covers the provision of base Facilities and multiplex slots on radio transmission Facilities and networks of such Facilities. These Facilities extend from a termination point in one central office to a similar point in another central office, or between any other ownership demarcation points agreed upon by the parties. The radio facility contracted items are route/location specific and must be comprised of compatible technology. A base facility consists of a fully operational microwave channel and associated protection switching arrangements from one central office to another including any intermediate repeaters or generators. It also may include equipment necessary to derive a baseband termination point, or highest level multiplex point, such as mastergroup or DS-3 level. The specific termination point shall be specified in the schedule for each location.

ATTACHMENT C

TABLE 1 -- NUMBER OF SNFAs IN EFFECT BY YEAR[63]

| | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 |
|---|---|---|---|---|---|---|
| Ameritech[64] | 825 | 765 | 720 | 665 | 530 | 300 |
| Bell Atlantic[65] | 2977 | 2616 | 2123 | 1481 | 915 | 63 |
| BellSouth[66] | | 2123 | 1934 | 1641 | 1255 | 807 |
| NYNEX[67] | 2731 | | | 1181[68] | | 44 |
| SW Bell (Total)[69] | 1433 | 1293 | 1077 | 931 | 674 | 384 |

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[63] The Commission did not specifically request the BOCs to submit information concerning the decline of the number of SNFAs in effect over time. However, all the BOCs except PacTel and US West have submitted this information in one form or another, and we find it useful to summarize the submissions of the other five BOCs in this table.

[64] Figures taken from graph in Ameritech Reply at 44. Figures represent the billing for Article 3 and 4 transmission SNFAs during the first quarter of each year, and are rounded to the nearest five SNFAs.

[65] Figures taken from table in Bell Atlantic Reply at 29. Figures represent Article 3 and 4 schedules in effect in July of each year.

[66] Figures taken from table found with SNFAs submitted by BellSouth on June 13, 1989, Volume 26 of 26, at pages 13,111 through 13,114. Figures represent the total number of SNFAs in effect at any time during the respective year.

[67] Figures taken from NYNEX Reply at 43. Figures represent Article 3 and 4 SNFAs only. Figures for 1989 represent SNFAs in effect in December 1989.

[68] NYNEX specifically states that 890 SNFAs were in effect in NET's service region in 1987. However, it mentions only that "fewer than half" of the 583 SNFAs in effect for NYT in 1984 were still in effect in 1987. Therefore, this figure is an approximation derived from 890 + 583/2.

[69] Figures taken from table in Southwestern Bell Reply at 19.

TABLE 2 -- SNFA BILLINGS BY YEAR[70]
(million $)

| | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 |
|---|---|---|---|---|---|---|
| Ameritech[71] | | 24 | 17.75 | 17.25 | 9.75 | |
| SW Bell (Total)[72] | 112.5 | 97.6 | 73.6 | 49.1 | 31.9 | 4.9 |

TABLE 3 -- NUMBER OF ARTICLE 3 AND 4 SNFAs
RELATIVE TO TOTAL NUMBER OF SNFAs

| | Article 3 and 4 SNFAs | Total SNFAs |
|---|---|---|
| Ameritech[73] | 963 | 1597 |
| BellSouth[74] | 472 | 807 |
| SW Bell[75] | 27 | 384 |

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[70] Figures taken from supplemental direct cases and replies of those BOCs reporting this information.

[71] Figures taken from graph in Ameritech Reply at 44. The figures represent the billing for Article 3 and 4 transmission SNFAs during the first quarter of each year, and are rounded to the nearest $250,000.

[72] Figures taken from table in Southwestern Bell Reply at 19, and are rounded to the nearest $100,000. Figure for 1989 represents first quarter data only.

[73] Ameritech Reply at 38. The figure for total SNFAs results from a counting of Ameritech SNFAs conducted by the Commission staff. The figure can be broken out by state as follows: Illinois, 330; Indiana, 205; Michigan, 289; Ohio, 467; Wisconsin, 306.

[74] Figures taken from table found with SNFAs submitted by BellSouth on June 13, 1989, Volume 26 of 26, at pages 13,111 through 13,114. Figures represent the numbers of SNFAs in effect at any time during the respective year.

[75] Figures taken from Southwestern Bell Reply at 19. Figure for Article 3 and 4 SNFAs includes only carrier on cable schedules and radio base facilities and multiplex slots.

TABLE 4 -- NUMBERS OF SNFAs THE BOCs CLASSIFY AS POP-TO-POP

BellSouth:[76] 25 of 470

NYNEX:[77] 24 of 1851

PacTel:[78] 268 of 587

Ameritech claims that no SNFAs go from POP to POP, but does not discuss this in detail. Ameritech Reply at 38. Bell Atlantic says very few SNFAs went from POP to POP, but does not give a specific number. Bell Atlantic Reply at 19-21. Southwestern Bell claims 25 percent of SNFAs cross LATA boundaries, but does not give a figure for POP to POP SNFAs. Southwestern Bell Reply at 20. US West claims 14 percent of the Article 3 and 4 SNFAs listed by MCI as "like" are "possibly" subject to further analysis. This could be construed as an admission that those SNFAs go from POP to POP, but US West does not discuss it further. US West Reply at 26-27.

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[76] BellSouth does not discuss all its Article 3 and Article 4 SNFAs, but only a subsection of SNFAs listed in MCI Opposition, Appendix, Vol. II.

[77] NYNEX Reply at 9-10.

[78] PacTel Reply at 18-19. The figure for admitted POP-to-POP SNFAs in PacTel's case was derived from adding the number actually admitted, 168, to the 100 SNFAs PacTel claimed were "out of date."

TABLE 5 -- NUMBER OF SNFAs MCI CLAIMS ARE "LIKE"[79]

| | Article 3[80] | Article 4 |
|---|---|---|
| Ameritech | 649 of 626 | 399 of 399 |
| Bell Atlantic | 1667 of 2307 | 707 of 707 |
| BellSouth | 336 of 332 | 910 of 910 |
| NYNEX | 1723 of 1780 | 281 of 290 |
| PacTel | 421 of 425 | 160 of 160 |
| SW Bell | 179 of 182 | 334 of 334 |
| US West | 70 of 70 | 381 of 403 |

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[79] These figures were obtained by counting the SNFAs listed in MCI Opposition, Appendix, Vol. II. Article 4 central office equipment SNFAs are not distinguished from Article 4 radio equipment SNFAs. MCI also gives no explanation of how it distinguished between Article 3 and 4 SNFAs that are like special access and those that are not.

[80] MCI gives no explanation for the anomalous results for Ameritech and BellSouth.

ATTACHMENT D
TABLE 1

PERCENTAGE OF ARTICLE 3 AND ARTICLE 4 NOF SNFAs WITH CENTRAL OFFICE EQUIPMENT AT THEIR "A" AND "Z" POINTS

| | Ameritech[81] | Bell Atlantic[82] | BellSouth[83] | NYNEX[84] |
|---|---|---|---|---|
| SNFAs with COE at One End | 52 | 46 | 22 | 17 |
| SNFAs with COE at Neither End | 90 | 18 | 9 | 32 |
| InterLATA | 6 | | | |
| COE at Both Ends But With Non-Matching Technology | 25 | | | |
| Miscellaneous Factors Which Preclude a Finding of Likeness[85] | 10 | 4 | | |
| IntraLATA SNFAs With COE at Both Ends | 4 | 28 | 16 | 4 |
| Sample Total | 187 | 119 | 47 | 53 |
| Percentage of SNFAs That Could Be Considered "Like" | 0.02 | 23.5 | 34.0 | 7.5 |

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[81] Sample is all Wisconsin Article 3 and Article 4 SNFAs.

[82] Sample is all Virginia Article 3 and Article 4 SNFAs.

[83] Sample is all Mississippi Article 3 and Article 4 SNFAs.

[84] Sample is all New York Article 4 SNFAs and all New York Article 3 SNFAs ending in "0."

[85] Miscellaneous factors which preclude a finding of likeness are: Schedule is for an Article 3F guyed tower; or one facility has two SNFA numbers because it was renumbered. Where we found a group of two or more SNFAs with the same "A" and "Z" locations, so that the facility apparently did not provide an end-to-end transmission path, only one of that group was considered "like."

TABLE 1 CONTINUED

PERCENTAGE OF ARTICLE 3 AND ARTICLE 4 NOF SNFAs WITH CENTRAL OFFICE EQUIPMENT AT THEIR "A" AND "Z" POINTS

| | PacTel[86] | SW Bell[87] | US West[88] |
|---|---|---|---|
| SNFAs with COE at One End | 21 | 13 | 9 |
| SNFAs with COE at Neither End | 19 | | 15 |
| InterLATA | 2 | 6 | 12 |
| COE at Both Ends, But With Non-Matching Technology | | 10 | 2 |
| Miscellaneous Factors Which Preclude a Finding of Likeness[89] | | 4 | 8 |
| IntraLATA SNFAs With COE at Both Ends | 15 | 16 | 7 |
| Sample Total | 57 | 45 | 53 |
| Percentage of SNFAs That Could Be Considered "Like" | 26.3 | 35.5 | 13.2 |

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[86] Sample is all California Article 4 SNFAs and California Article 3 SNFAs with serial numbers ending in "0".

[87] Sample is all Kansas Article 3 and Article 4 SNFAs.

[88] Sample is all Minnesota Article 3 and Article 4 SNFAs.

[89] Miscellaneous factors which preclude a finding of likeness are: Schedule is for an Article 3F guyed tower; or one facility has two SNFA numbers because it was renumbered. Where we found a group of two or more SNFAs with the same "A" and "Z" locations, so that the facility apparently did not provide an end-to-end transmission path, only one of that group was considered "like."

TABLE 2

CALCULATION OF COMMISSION'S ESTIMATE OF TOTAL NUMBER OF LIKE SNFAs

| BOC | A<br>Percentage of Articles 3 and 4 SNFAs That Could Be Considered "Like"[90] | B<br>MCI's Figures For Total Number of Article 3 and Article 4 SNFAs | C<br>Total Number of "Like" SNFAs (A * B) |
|---|---|---|---|
| Ameritech | 0.02 | 1025 | 2 |
| Bell Atlantic | 23.5 | 3014 | 708 |
| BellSouth | 34.0 | 1242 | 422 |
| NYNEX | 7.5 | 2070 | 155 |
| PacTel[91] | 26.3 | 441 | 115 |
| SW Bell | 35.5 | 516 | 183 |
| US West | 13.2 | 473 | 62 |

Total of Column C = 1647

Percentage
= 1647/8925 = 18.4 percent

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[90] Taken From Attachment D of this Order, Table 1.

[91] The figure for the total number of PacTel Article 3 and Article 4 SNFA is the result of the Commission's Survey.

ATTACHMENT E

TABLE 1

| EXAMPLES | 1<br>IL 00602 | 2<br>MD 23550 | 3<br>LA 33124 | 4<br>NY 13407 |
|---|---|---|---|---|
| ORIGINAL MCI SUBMISSION | | | | |
| SNFA Billing | $ 13582 | $ 222981 | $ 5046 | $ 182394 |
| Tariff Cost | 121496 | 1306336 | 226212 | 825997 |
| Alleged SNFA Saving | 107914 | 1083355 | 221166 | 643603 |
| CORRECTED MCI SUBMISSION | | | | |
| SNFA Billing | 13582 | 222981 | 5046 | 182394 |
| Tariff Cost | 121496 | 560284 | 226212 | 665727 |
| Alleged SNFA Saving | 107914 | 337303 | 221166 | 483333 |
| FCC MODIFICATIONS | | | | |
| SNFA Billing | 13582 | 270423 | 5046 | 182394 |
| Tariff Cost | 75579 | 399476 | 110575 | 385455 |
| Alleged SNFA Saving | 61997 | 129053 | 105529 | 203061 |

| | 5<br>CA 81454 | 6<br>MO 00194 | 7<br>MN 12008 | TOTAL |
|---|---|---|---|---|
| ORIGINAL MCI SUBMISSION | | | | |
| SNFA Billing | $ 18937 | $ 29641 | $ 2571 | $ 474669 |
| Tariff Cost | 337046 | 86832 | 14779 | 2918698 |
| Alleged SNFA Savings | 318109 | 57191 | 12208 | 2444029 |
| CORRECTED MCI SUBMISSION | | | | |
| SNFA Billing | 18937 | 7413 | 2571 | 452924 |
| Tariff Cost | 359220 | 53212 | 13472 | 1999623 |
| Alleged SNFA Savings | 340283 | 45799 | 10901 | 1546699 |
| FCC MODIFICATIONS | | | | |
| SNFA Billing | 18937 | 7413 | 2571 | 500366 |
| Tariff Cost | 233806 | 28854 | 9592 | 1243337 |
| Alleged SNFA Savings | 214869 | 21441 | 7021 | 742971 |

TABLE 2

EXAMPLE 1 - AMERITECH - IL 00602

| | MCI ORIGINAL CALCULATION | MCI CORRECTED CALCULATION | FCC MODIFICATIONS |
|---|---|---|---|
| TARIFF | | | |
| Channel Termination | 2@ 478.30 = 956.60 | | 0 |
| Channel Mileage | | NO CHANGE | |
| Fixed | 1 @ 68.45 = 68.45 | | 1@ 68.45= 68.45 |
| Variable | 33 @ 45.64 = 1506.12 | FROM | 33@ 45.64=1506.12 |
| | 2531.17 | | 1574.57 |
| Capacity | x 8 | ORIGINAL | x 8 |
| | 20,249.36 | | 12596.56 |
| Months | x 6 | CALCULATION | x 6 |
| | 121496.16 | | 75579.36 |
| SNFA Billing 1Q & 2Q 1987 | 13582 | | 13582 |
| Difference | $ 107,914 | | $ 61,997[92] |

[92] The SNFA billing for MCI's Ameritech example was 82 percent lower than the charges would have been for equivalent special access service.

TABLE 3

EXAMPLE 2 - BELL ATLANTIC - MD 23550

| | MCI ORIGINAL CALCULATION | MCI CORRECTED CALCULATION | FCC MODIFICATIONS |
|---|---|---|---|
| TARIFF | | | |
| Channel Termination | 2@ 279.18 = 558.36 | 2 @ 279.18 = 558.36 | 0 |
| Channel Mileage | | | |
| Fixed | 1@ 45.70 = 45.70 | 1 @ 145.70 = 145.70 | 1@ 145.70 = 145.70 |
| Variable | 39 @ 31.83 =3931.83[93] | 39 @ 31.83 = 1241.37 | 39@ 31.83 =1241.37 |
| | 4535.89 | 1945.43 | 1387.07 |
| Capacity | x 48 | x 48 | x 48 |
| | 217,722.72 | 93,380.64 | 66,579.36 |
| Months | x 6 | x 6 | x 6 |
| | 1,306,336.32 | 560,283.84 | 399,476 |
| SNFA Billing 1Q & 2Q 1986 | 222981 | 222981 | 270,423 |
| Difference | $ 1,083,355 | $337,303 | $ 129,053[94] |

[93] MCI made a mistake in its multiplication.

[94] The SNFA billing was 32 percent lower than the charges would have been for equivalent special access service.

TABLE 4

EXAMPLE 3 - BELLSOUTH - LA 33124

| | MCI ORIGINAL CALCULATION | MCI CORRECTED CALCULATION | FCC MODIFICATIONS |
|---|---|---|---|
| TARIFF | | | |
| Channel Termination | 2@ 33.46 = 66.92 | | 0 |
| Channel Mileage | | NO CHANGE | |
| Fixed | 1@ 31.93 = 31.93 | | 1@ 31.93 = 31.93 |
| Variable | 14@ 2.29 = 32.06 | FROM | 14@ 2.29 = 32.06 |
| | 130.91 | | 63.99 |
| Capacity | x 144 | ORIGINAL | x 144 |
| | 18851.04 | | 9214.56 |
| Months | x 12 | | x 12 |
| | 226212.48 | CALCULATION | 110575 |
| SNFA Billing 1987 | 5046 | | 5046 |
| Difference | $ 221,166 | | $ 105,529[95] |

[95] The SNFA billing for this example was .95 percent lower than the charges would have been for equivalent special access service.

TABLE 5

EXAMPLE 4 - NYNEX - NY 13407

| | MCI ORIGINAL CALCULATION | MCI CORRECTED CALCULATION | FCC MODIFICATIONS |
|---|---|---|---|
| TARIFF | | | |
| Channel Termination | 2@ 382.26 = 764.52 | 2@ 268.46 = 536.92 | 0 |
| Channel Mileage | | | |
| Fixed | 1@ 80.47 = 80.47 | 1@ 145.94 = 145.94 | 1@ 145.94 = 145.94 |
| Variable | 23@ 32.06 = 737.38 | 23@ 25.76 = 592.48 | 23@ 25.76 = 592.48 |
| | 1582.37 | 1275.34[96] | 738.42 |
| Capacity | x 58 | x 58 | x 58 |
| | 91,777.46 | 73,969.72 | 42,828.36 |
| Months | x 9 | x 9 | x 9 |
| | 825,997.14 | 665727.48 | 385455.24 |
| SNFA Billing 2Q - 4Q 1985 | 182394 | 182394 | 182394 |
| Difference | $ 643,603 | $483,333 | $ 203,061[97] |

[96] MCI calculated an average tariff rate based on the channel termination charges and the fixed and variable channel mileage charges in effect during the last three quarters of 1985.

[97] The SNFA billing for the NYNEX example was 53 percent lower than the charges would have been for equivalent special access service during this period.

TABLE 6

EXAMPLE 5 - PACIFIC TELESIS - CA 81454

| | MCI ORIGINAL CALCULATION | MCI CORRECTED CALCULATION | FCC MODIFICATIONS |
|---|---|---|---|
| TARIFF | | | |
| Channel Termination | 2@ 326.60 = 653.20 | 2 @ 326.60 = 653.20 | 0 |
| Channel Mileage | | | |
| Fixed | 1@ 115.49 = 115.49 | 1@ 115.49 = 115.49 | 1@115.49 = 115.49 |
| Variable | 25@ 44.09 = 1102.25 | 25@ 44.09 = 1102.25 | 25@ 44.09 = 1102.25 |
| | 1755.45[98] | 1870.94 | 1217.74 |
| Capacity | x 64 | x 64 | x 64 |
| | 112,348.80 | 119,740.16 | 77,935.36 |
| Months | x 3 | x 3 | x 3 |
| | 337,046.40 | 359,220.48 | 233,806.08 |
| SNFA Billing 4Q 1985 | 18937 | 18937 | 18,937.00 |
| Difference | $ 318,109 | $340,283 | $ 214,869[99] |

[98] MCI made a mistake in its addition computation.

[99] The SNFA billing for MCI's PacTel example was 92 percent lower than the charges would have been for equivalent special access service.

TABLE 7

EXAMPLE 6 - SOUTHWESTERN BELL - MO 00194

| | MCI ORIGINAL CALCULATION | MCI CORRECTED CALCULATION | FCC MODIFICATIONS |
|---|---|---|---|
| TARIFF | | | |
| Channel Termination | 2@ 29.75 = 59.50 | 2@ 29.75 = 59.50 | 0 |
| Channel Mileage | | | |
| Fixed | 1 @ 10.58 = 10.58 | 1 @ 57.62 = 57.62 | 1@ 32.63= 32.63 |
| Variable | 31 @ 5.52 = 171.12 | 31 @ .99 = 30.69 | 24@ 1.98= 47.52 |
| | 241.20 | 147.81 | 80.15 |
| Capacity | x 120 | x 120 | x 120 |
| | 28,944.00 | 17,737.20 | 9,618.00 |
| Months | x 3 | x 3 | x 3 |
| | 86,832.00 | 53,211.60 | 28,854.00 |
| SNFA Billing 3Q 1985 | 29,641.00[100] | 7413.00 | 7,413.00 |
| Difference | $ 57,191.00 | 45,799.00 | $21,441.00[101] |

[100] SNFA billing for 1985. MCI did not divide by 4 to calculate 3rd Quarter 1989 billing.

[101] The SNFA billing was 74 percent lower than the charges would have been for equivalent special access service.

TABLE 8

EXAMPLE 7 - US West - MN 12008

| | MCI ORIGINAL CALCULATION | MCI CORRECTED CALCULATION | FCC MODIFICATIONS |
|---|---|---|---|
| TARIFF | | | |
| Channel Termination | 2@ 26.94 = 53.88 | 2@ 26.94 = 53.88 | 0 |
| Channel Mileage | | | |
| Fixed | 1@ 70.11 = 70.11 | 1@ 51.15 = 51.15 | 1@ 51.15 = 51.15 |
| Variable | 38@ 2.16 = 82.08 | 38@ 2.16 = 82.08 | 38@ 2.16 = 82.08 |
| | 205.27[102] | 187.11 | 133.23 |
| Capacity | x 24 | x 24 | x 24 |
| | 4,926.48 | 4,490.64 | 3,197.52 |
| Months | x 3 | x 3 | x 3 |
| | 14,779.44 | 13,472.00 | 9,592.56 |
| SNFA Billing 2Q 85 | 2571.00 | 2571.00 | 2,571.00 |
| Difference | $ 12,208.00 | $ 10,901.00 | $ 7021.00[103] |

[102] MCI made a mistake in its addition computation.

[103] The SNFA billing was 73 percent lower than the charges would have been for equivalent special access service.

TABLE 9

Totals:

Difference Between Original MCI Submission and Corrected MCI Submission:

$ 2444029
- 1546699
879330 = 36.7%

Difference Between Original MCI Submission and FCC Modifications:

$ 2444029
- 742971
1701058 = 69.6%

| | |
|---|---|
| $ 1,989,000,000 | [SNFA savings alleged by MCI] |
| x 69.6 | [Percentage difference between SNFA savings alleged by MCI on its example SNFAs and SNFA savings as adjusted by the FCC] |
| $ 1,384,344,000 | (Adjustment to reflect correction of mistakes and eliminate overstatement of channel termination charges) |

| | |
|---|---|
| $ 1,989,000,000 | |
| - 1,384,344,000 | |
| $ 604,656,000 | [Total estimated SNFA savings as adjusted by FCC] |

ATTACHMENT F

REVIEW OF MCI'S SEVEN EXAMPLE SNFAs

Example 1 - Ameritech - IL 00602, 8 DS-1 circuits, 20 mile length

**153.** In its original Example 1, MCI identified the technology of the facility as fiber optics and the length as 33 miles and calculated the alleged cost variance based on the first half of 1986, to be $107,914, or 795 percent. In its corrected Example 1, MCI apparently agrees that the facility uses digital microwave, and that distance is 20 miles, but makes no change to its original cost calculations.

**154.** We believe that there are flaws in the methodology MCI has used and therefore we have made an adjustment. We have excluded channel termination charges, as discussed above. If this modification is considered, MCI's alleged cost variance is reduced from $107,914 to $61,997. See Attachment E, Table 2.

Example 2 - Bell Atlantic - MD 23550, 48 DS-1s, 51 mile length

**155.** In its original Example 2, MCI calculates the alleged cost variance to be $1,083,355. However, the original Example 2 contains multiple errors which, when corrected by MCI, reduce the alleged cost variance to $337,303. The errors include use of the incorrect fixed monthly rate for channel mileage and a multiplication mistake when calculating variable channel mileage charges.

**156.** Even after MCI's corrections, however, we believe there are flaws in the methodology MCI has used. First, MCI calculates the first half of the 1986 billing for SNFA - MD 23550 by taking the total 1986 billing of $445,961.86 and dividing by two to arrive at $222,981. This approach assumes that the non-owner contracted capacity was the same for the first half of 1986 as the second half of 1986. An examination of the Network of Facilities Schedule for MD 23550 indicates the non-owner (AT&T) contracted capacity was 47.4 percent for the first half of 1986. For the 3rd Quarter 1986 the non-owner contracted capacity was 40 percent and for the 4th Quarter 1986 it decreased to 20 percent. Thus, because the non-owner contracted capacity was greater during the first half of the year, it is logical to expect the corresponding SNFA billing to be greater during that part of the year. The correction to reflect the actual SNFA billing of $270,423 for the first and second quarters, instead of the average for the year makes more sense and we have made this modification.

**157.** Second, we have excluded channel termination charges. Based on these two modifications, MCI's alleged cost variance is reduced from its original $1,083,355 to $129,053. See Attachment E, Table 3.

Example 3 - BellSouth - LA 33124, 12 N-Carrier Cable Pairs, 14 mile length

158. In its original Example 3, MCI calculates the alleged cost variance to be $221,166. In its corrected Example 3, MCI makes no change to its original cost calculations. MCI compares the 12 N-Carrier facilities to 144 voice grade circuits. However, this comparison seriously understates the equivalent special access charges. Appropriate N-carrier central office equipment is needed at each end of the facility to derive voice circuits. Exclusion of the channel termination charges reduces MCI's alleged cost variance from $221,166 to $105,529. See Attachment E, Table 4.

Example 4 - ONEX - NY 13407

159. In its original Example 4, MCI calculates the alleged cost variance to be $643,603. However, the original Example 4 contains multiple errors which, when corrected by MCI, reduce the alleged cost variances to $483,333. The errors resulted from MCI's use of incorrect fixed and variable (per mile) monthly rates for channel mileage due to its using the mileage band for 5-8 miles instead of the 9-25 mileage band. In addition, MCI originally used the highest effective rates during the 2nd through 4th Quarters 1985 to be representative of the period. In its revisions MCI has decided to use a weighted average of the rates in effect for the nine-month period. These changes alone reduce MCI's original Example 4 variance by 25 percent.

160. Even after MCI's corrections, however, we believe there are flaws in the methodology MCI has applied. MCI has used channel termination charges in its calculations. The MCI methodology would have AT&T, in replacing the SNFAs between AT&T's POPs, purchase a separate special access service, including two channel terminations on each channel. Since AT&T already purchases access from the BOCs to connect its customers to the nearest AT&T POP, MCI's methodology would have AT&T paying for four channel terminations. We do not believe the replacement of SNFAs with special access would warrant these additional termination charges and therefore are excluding them from our cost comparison. If this modification is considered, MCI's alleged cost variance is reduced from its original $643,603 to $203,061. See Attachment E, Table 5.

Example 5 - Pacific Telesis - CA 81454

161. In the original Example 5, MCI calculates the alleged cost variance to be $318,109. However, the original Example 6 contained a mathematical error which when corrected by MCI increases the alleged cost variance to $340,283.

162. In spite of MCI's correction which increases the alleged cost variance, we believe there are flaws in the methodology MCI has applied. If the inclusion of the channel termination charge is eliminated, the difference is reduced by $125,414. If this modification is considered, MCI's alleged cost variance is reduced from $340,283 to $214,869. See Attachment E, Table 6.

Example 6 - Southwestern Bell - MO 00194

163. In its original Example 6, MCI calculates the alleged cost variance to be $57,191. However, the original Example 6 contains multiple errors which, when corrected by MCI, reduce the alleged cost variance to $45,799. MCI used incorrect fixed and variable (per mile) monthly rates for channel mileage. A

review of FCC Tariff No. 1, effective April 1, 1985, indicates that for channel mileage of 31 airline miles (Mileage Band Over 25 to 50 Range) the monthly rate for fixed channel mileage is $57.62 and for variable mileage is $.99 per mile.

**164.** Even after MCI's corrections, however, we believe there are numerous flaws in the methodology MCI has applied. First, MCI has chosen for its example SNFA - MO 00194, which is only the Missouri portion of the Leavenworth, Kansas, to St. Joseph, Missouri, SNFA arrangement. The Missouri portion only extends to the Kansas state line yet MCI has calculates the total airline mileage (31 miles) from St. Joseph to Leavenworth. Since SNFA MO 00194 only extends to the state line and has a point to point distance of 23.2225 miles it would be more accurate to use 24 miles instead of 31 miles to calculate the variable channel mileage charge. Using 24 miles changes the mileage band, reduces the monthly rate for fixed channel mileage to $32.63, and raises the monthly rate for variable mileage to $1.98 per mile.

**165.** Second, MCI has used channel termination charges in its calculations. Channel terminations are primarily based upon the local loop plant and associated equipment to connect the end user to the local serving office, and SNFA arrangements do not provide these facilities. For a SNFA facility to connect to an AT&T customer, AT&T must pay special access charges which include channel termination charges. If a SNFA facility is theoretically replaced by special access there would be no additional channel termination charges. Therefore, channel termination charges have been excluded from our calculation. Based on these modifications, MCI's alleged cost variance has been reduced from its original $57,191 to $21,441. See Attachment E, Table 7.

Example 7 - US West - MN 12008

**166.** In its original Example 7, MCI calculates the alleged cost variance to be $12,208. However, the original Example 7 contains two errors which, when corrected by MCI, reduce the alleged cost variance to $10,901. One error was the result of MCI's using the wrong mileage band charges, and the other error was a result of a mathematical mistake.

**167.** Even after MCI's corrections, we believe there are flaws in MCI's methodology. If the channel termination charges are excluded from its calculations, the alleged cost variance is reduced by $3,879. If these modifications are considered, MCI's alleged cost variance is reduced from the original $12,208 to $7,021. See Attachment E, Table 8.

ATTACHMENT G

SNFA Terminations

| | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 | Total |
|---|---|---|---|---|---|---|---|
| AMERITECH | | | | | | | |
| IN EFFECT | 825 | 765 | 720 | 665 | 530 | 300 | |
| TERMINATING | 60 | 45 | 55 | 135 | 230 | | 525 |
| PERCENTAGE TERMINATING | 7.3% | 5.5% | 6.7% | 16.4% | 27.9% | | 63.6% |
| BELL ATLANTIC | | | | | | | |
| IN EFFECT | 2977 | 2616 | 2123 | 1481 | 915 | 63 | |
| TERMINATING | 361 | 493 | 642 | 566 | 852 | | 2914 |
| PERCENTAGE TERMINATING | 12.1% | 16.6% | 21.6% | 19.0% | 28.6% | | 97.9% |
| BELLSOUTH | | | | | | | |
| IN EFFECT | 2123 | 2123 | 1934 | 1641 | 1225 | 807 | |
| TERMINATING | | 189 | 293 | 386 | 448 | | 1316 |
| PERCENTAGE TERMINATING | | 8.9% | 13.8% | 18.2% | 21.1% | | 62% |
| NYNEX | | | | | | | |
| IN EFFECT[104] | 2015 | 2015 | 1741 | 1264 | 605 | 95 | |
| TERMINATING | | 274 | 477 | 659 | 510 | 5 | 1925 |
| PERCENTAGE TERMINATING | | 13.6% | 23.7% | 32.7% | 25.3% | .3% | 95.5% |
| SOUTHWESTERN BELL | 1433 | 1293 | 1077 | 931 | 674 | 384 | |
| TERMINATING | 140 | 216 | 146 | 257 | 290 | | 1049 |
| PERCENTAGE TERMINATING | 9.8% | 15.1% | 10.2% | 17.9% | 20.2% | | 73.2% |

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[104] Based on SNFA contracts considered by MCI to be equal to special access.

US WEST

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| IN EFFECT[105] | 473 | 473 | 446 | 372 | 290 | 182 | |
| TERMINATING | | 27 | 74 | 82 | 108 | 36 | 327 |
| PERCENTAGE TERMINATING | | 5.7% | 15.6% | 17.3% | 22.8% | 7.6% | 69.19% |

PAC TEL

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| IN EFFECT[106] | 581 | 562 | 495 | 308 | 226 | 107 | |
| TERMINATING | 19 | 67 | 187 | 82 | 119 | 5 | 479 |
| PERCENTAGE TERMINATING | 3.3% | 11.5% | 32.2% | 14.1% | 20.5% | .8% | 82.4% |

TOTAL BOC

| | | | | | | |
|---|---|---|---|---|---|---|
| IN EFFECT | 10427 | 9847 | 8536 | 6662 | 4495 | 1938 |
| TERMINATING | 580 | 1311 | 1874 | 2167 | 2557 | 46 |
| PERCENTAGE TERMINATING | 5.6% | 12.6% | 18% | 20.8% | 24.5% | .4% |

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[105] Based on SNFA contracts considered by MCI to be equal to special access.

[106] Based on SNFA contracts considered by MCI to be equal to special access.

ATTACHMENT H

COMPARISON OF SNFA CHARGES WITH SPECIAL ACCESS CHARGES FOR
NEW YORK SNFAs 13424 AND 13426

New York SNFA 13424: Contract Unit Type: DS1 Location A: GRCYNYGC
Airline Miles: 3 Location B: HMPSNYHS

Charges for "Equivalent" Special Access Service:

| | | |
|---|---|---|
| April 1, 1985, to September 30, 1985 @ $599.13/mo. | = | 3594.78 |
| October 1, 1985, to October 12, 1985 @ $29.89/day | = | 358.68 |
| October 13, 1985, to October 31, 1985 @ $29.98/day | = | 569.62 |
| November 1, 1985, to December 31, 1985 @ $929.39/mo. | = | 1858.78 |
| Total Computed Special Access Charges from April to December, 1985 | = | 6381.86 |
| New York SNFA 13424 Billing from April to December, 1985 | = | 94676.00 |
| Dollar Difference Between SNFA Billing and Special Access Charges | = | 88294.14 |

New York SNFA 13424 was priced over 14 times more than the equivalent special access service.

New York SNFA 13426: Contract Unit Type: DS1 Location A: BOHENYJN
Airline Miles: 48 Location B: NYCMNY54

Charges for "Equivalent" Special Access Service:

| | | |
|---|---|---|
| April 1, 1985, to September 30, 1985 @ $1835.61/mo. | = | 11013.66 |
| October 1, 1985, to October 12, 1985 @ $67.15/day | = | 805.80 |
| October 13, 1985, to October 31, 1985 @ $67.35/day | = | 1279.65 |
| November 1, 1985, to December 31, 1985 @ $2087.85/mo. | = | 4175.70 |
| Total Computed Special Access Charges from April to December, 1985 | = | 17274.81 |
| New York SNFA 13426 Billing from April to December, 1985 | = | 46659.00 |
| Dollar Difference Between SNFA Billing and Special Access Charges | = | 29384.19 |

New York SNFA 13426 was priced over 2.5 times more than the equivalent special access service.

(1) NYNEX

168. In its region, NYNEX claims that only about 1 percent of its SNFA transmission leases could have been replaced by special access. It examined the 1851 Article 3 and 4 transmission facility leases[107] in effect at any time subsequent to April 1, 1985, when the special access tariffs took effect. It states that 1041 (or 56 percent) were physically interLATA, 786 linked either two NYNEX wire centers or a wire center and a POP, and only 24 provided transmission between two AT&T POPs. NYNEX Reply at 9-23.

169. Our survey examined all Article 4 SNFAs in New York, and the Article 3 SNFAs in New York with serial numbers ending in "0". Of the 40 Article 3 facilities we surveyed, 10 had compatible central office equipment at one end, and 29 had compatible central office equipment at neither end. Only one SNFA in our NYNEX study had central office equipment available to complete a transmission path. We discovered 13 Article 4 NOF SNFAs in New York. Seven of these had compatible central office equipment at one end, and three had compatible central office equipment at neither end. Only three could have been used as part of a complete intraLATA transmission path. Therefore, a total of 4 out of 53, or 7.5 percent, of the SNFAs in our New York survey were "like" special access.

(2) Ameritech

170. Of the 963 Ameritech transmission SNFAs, 639 are Article 3, but according to Ameritech, Article 4 facilities SNFAs necessary to perform central office functions are associated with only 22.8 percent of Article 3 leases. Even in these instances, the needed COE is not generally available at both ends of the transmission facility; Ameritech states that "there is not a single instance in which the combination of Article 3 and 4 SNFA leases to AT&T provide the equipment necessary to make up the piece parts of special access service." Ameritech Reply at 38 (affidavit citations omitted). Ameritech does not, however, indicate how many, if any, of its 75 Article 4 radio transmission SNFAs can be configured to provide complete transmission paths.

171. For Ameritech, we examined the 140 Article 3 SNFAs and 47 Article 4B SNFAs in Wisconsin. Among the Article 3 SNFAs, six cross state and LATA lines, 10 apparently do not extend the full distance between the A and Z points, 36 have central office equipment at only one end, 59 have central office equipment at neither end, 25 terminate at locations where the central office equipment that is available does not match the transmission technology, and four apparently can be matched with appropriate central office equipment to assemble

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[107] NYNEX apparently excludes non-transmission facility Article 4 SNFAs.

complete transmission paths.[108] Among the Article 4 SNFAs, 16 have voice frequency circuit equipment at only one end, 31 have equipment at neither end, and none have equipment at both ends.

**172.** While it is unclear what standard Ameritech is applying in claiming that none of its Article 3 SNFAs is "like" special access, our analysis of the Wisconsin SNFAs does support the conclusion that only a small fraction at most of Ameritech's SNFAs can be used to assemble complete transmission paths "like" those provided by special access.

(3) PacTel

**173.** PacTel similarly states that of the 587 SNFAs MCI claims are "like" special access, 156 are for interLATA facilities not available under special access tariffs; 29 were terminated either before the availability of special access or before any facility was provided; 152 are Article 4 leases of equipment unassociated with transmission; and 168 (or 28.6 percent) connected two AT&T POPs in the same LATA.[109]

**174.** Our PacTel sample included all California Article 4 SNFAs and all California Article 3 SNFAs with serial numbers ending in "0". Of the 49 Article 3 SNFAs we examined, 19 had no central office equipment (COE) on either end, 17 had COE at only one end location, and two crossed LATA boundaries. Only 11 Article 3 SNFAs could be used to complete intraLATA midlink circuits. Of the eight Article 4 NOF SNFAs in California, four had compatible COE on one end and four had compatible COE on both ends. Therefore, our study revealed 15 of 57 SNFAs in California, or 26.3 percent, could have been used to complete intraLATA midlink transmission paths. We conclude that 26.3 percent of the 441 Article 3 and Article 4 NOF SNFAs in PacTel's service region, or 115, can be configured to provide complete transmission paths.

(4) Southwestern Bell

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[108] Article 3 SNFA 20123 (associated with Article 4A SNFAs 52061 and 50094), SNFA 20124 (associated with SNFAs 50094 and 50100), SNFA 20144 (associated with SNFAs 50064 and 50085), and SNFA 20169 (associated with SNFAs 50065 and 50140).

[109] PacTel also states that 100 schedules "were for equipment and technology that is so out of date (such as N, ON, and analog radio equipment) that it could not provide a service that meets the technical specifications in the Pacific Companies' special access tariffs, and almost certainly would be junked when AT&T's lease terminates." PacTel Reply at 18. This claim of obsolescence is unsupported and unpersuasive. The fact that the facilities were available and actually in use by both PacTel and AT&T during this period is compelling evidence that they were not obsolete from the perspective of the customer, and undermines the apparent claim that these schedules are functionally different from special access. PacTel also does not identify the actual differences in transmission quality or provide evidence that the difference was material.

175. Southwestern Bell discusses the number of its Article 3 and Article 4 SNFAs very little. It notes that the number of Article 3 Carrier on Cable facilities and Article 4 Radio Base Facilities and Multiplex Slots has deceased from 278 in 1984 to 27 in 1989. Southwestern Bell Reply at 19-20. It also asserts that 25 percent of its SNFAs cross LATA boundaries. Id. at 20.

176. We conducted our survey on the Article 3 and Article 4 SNFAs in Kansas. Of the 30 Article 3 SNFAs, 10 have COE at only one end location and 10 terminate at locations where the COE uses incompatible technology. Only 10 can be used to complete intraLATA midlink transmission paths. Of the 15 Article 4 NOF SNFAs in Kansas, 6 cross LATA boundaries and 3 have COE at only one end location. Only 6 Article 4 SNFAs can be used to complete intraLATA midlink circuits. Of the 45 Article 3 and Article 4 NOF SNFAs in Kansas, only 16, or 35.5 percent, can be used to complete intraLATA midlink transmission paths.

(5) Bell Atlantic

177. Bell Atlantic states that most of its SNFAs are interLATA and many do not connect to any AT&T POP, and thus cannot be replaced by special access. Some terminate at demarcation points such as manholes or cable splices. It also points out that a bare Article 3 transmission facility does not provide the necessary central office equipment. Bell Atlantic Reply at 18- 22.

178. As our Bell Atlantic sample, we examined the 87 Article 3 and 32 Article 4B SNFAs in Virginia. Of the Article 3 SNFAs, 18 are interLATA, 29 have COE on one end, 16 have COE on neither end, four do not end at a central office, one is for a guyed tower, three appear to be miscellaneous incomplete facilities, and 16 or 18 percent apparently provide a complete transmission path between two points with COE available at both ends. All of the Article 4 SNFAs are NOFs. Of these, 17 have COE at one end, two have COE at neither end, and 12 or 37.5 percent have COE at both ends.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 93-2**

In the Matter of

Amendment of Part 21 of the
Commission's Rules for the Domestic
Public Fixed Radio Services

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: January 6, 1993; Released: February 9, 1993**

**Comment Date: March 16, 1993**
**Reply Date: April 16, 1993**

By the Commission:

## I. INTRODUCTION

1. By this Notice of Proposed Rulemaking, we propose to revise Part 21 of our Rules, which requires that Point-to-Point Microwave Radio Service (PPMS) applicants obtain an authorization prior to commencing construction of proposed facilities. Under the proposed rule, PPMS applicants that satisfy certain requirements could begin construction of proposed facilities upon filing FCC Form 494 (Application for a New or Modified Microwave Radio Station License under Part 21), prior to grant of an authorization. In this proceeding, we also seek comments on the proposed revision and elimination of several reporting requirements for all Part 21 applicants, including PPMS applicants.

2. On October 16, 1991, McCaw Cellular Communications, Inc. filed a Petition for Rulemaking (RM-7861) proposing to revise Part 21 to allow PPMS applicants to obtain permanent authorization using procedures currently reserved for obtaining authorization for facilities at temporary-fixed locations. Comments were filed in response to the McCaw Petition by parties listed at Appendix C. We will consider the McCaw Petition in the context of this rulemaking proceeding.

## II. DISCUSSION

3. Section 319(d) of the Communications Act of 1934, as amended, 47 U.S.C. Section 319(d), provides that a construction permit shall "not be required for . . . stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits." Part 21 applicants, including PPMS applicants, are currently required to obtain authorization prior to commencing construction of proposed facilities. 47 C.F.R. § 21.3. In the *Report and Order*, 2 FCC Rcd 5713, 5718 (1987)("*Part 21 Revision*"), we established a one-step licensing process for Part 21 applicants. Under one-step licensing, an applicant receives a conditional license upon grant of its application. Upon construction completion, a certification of completion of construction (FCC Form 494A) is filed by the conditional licensee. Although we eliminated the requirement that Part 21 applicants obtain construction permits prior to commencing construction of proposed facilities, we retained the requirement that an applicant must obtain authorization prior to construction. At the time we adopted one-step licensing, we were unconvinced that allowing construction of facilities prior to grant of an authorization would be in the public interest. We believed that pre-construction authorization had worked well and did not impose substantial costs on applicants. *Id.* at 5718. However, with the continuing diversity of the telecommunications industry in the time since the *Part 21 Revision*, and the continuing growth in the use of telecommunications services, the public is demanding a wider range of microwave radio services and swifter delivery of those services by PPMS applicants. Often, construction of PPMS facilities must be coordinated with construction projects for cellular, satellite, or other telecommunications services. Unnecessary delays in the commencement of construction of facilities can occur under the current rules which can have a substantial impact on construction costs for PPMS applicants and ultimately for the public. These delays may hinder the ability of PPMS providers to compete to satisfy certain requirements. The revised rule we propose in this proceeding may reduce construction costs for PPMS applicants and improve their competitiveness by allowing them greater flexibility in coordinating and consolidating construction projects.

4. The *Part 21 Revision* further reasoned that problems involving frequency conflicts would be more difficult to resolve after an investment of construction costs if construction of facilities prior to grant was permitted. *Id.* at 5718. While this concern may remain for some Part 21 services, we believe greater flexibility is possible for PPMS applicants. We note that in the PPMS, highly directional antennas allow PPMS licensees to use the same frequency several times over in a single geographic area, making prior frequency coordination essential to avoiding frequency conflicts. Accordingly, PPMS applicants are required to complete the full notice and response steps of the prior frequency coordination procedures prior to filing FCC Form 494 (Application for a New or Modified Microwave Radio Station License), pursuant to Section 21.100(d) of the Rules. Our experience has been that few frequency coordination conflicts arise among PPMS applicants and those that do arise are virtually all resolved through the mutual cooperation of the parties before the application is filed and with minimal intervention by the Commission. Thus, while we are acutely aware of the importance of preserving the integrity of the frequency coordination process, we do not believe that allowing pre-authorization construction by PPMS applicants will result in any significant increase in the number of unresolved frequency conflicts. In light of the foregoing, we tentatively conclude that permitting PPMS applicants to construct proposed facilities prior to the grant of an authorization is in the public interest.

5. *Eligibility*. Accordingly, we propose to permit PPMS applicants to commence construction of proposed facilities upon filing FCC Form 494. An applicant engaging in pre-authorization construction would assume the risk that its application would not ultimately be granted, or that the Commission may order its proposed facilities altered, relocated, or dismantled should such action prove necessary. In order to minimize that risk, only those applications

which raise no special issues or otherwise are eligible for routine grant would be permitted to engage in construction prior to authorization. Accordingly, the proposed rules would permit a PPMS applicant to engage in construction upon filing FCC Form 494, unless its application:

(1) is mutually exclusive with a previously filed application or has a petition to deny filed against it;

(2) requests a waiver of a Commission rule pursuant to §21.19 of the rules;

(3) is returned as unacceptable for filing pursuant to § 21.20;

(4) where required (and not exempted under §17.14 of the rules), has not filed a notice of proposed construction with the FAA and received a determination from the FAA that the proposed antenna structure would pose no hazard to aviation, and has not received a determination from the Commission as to any required antenna structure marking and lighting specifications;

(5) has not: (A) considered whether the proposed facility may have a significant effect upon the environment pursuant to §§ 1.1301 through 1.1319 of the rules; (B) determined that the proposed facility will not have such an effect; and (C) indicated this determination on FCC Form 494;

(6) the proposed facility is within 56.3 kilometers (35 miles) of the U.S.-Canadian or U.S.-Mexican border, or is otherwise subject to a treaty or agreement between the United States and Canada or between the United States and Mexico regarding frequency coordination, or both.

6. These conditions mirror those imposed upon applicants in other services where preauthorization construction is allowed. *See, e.g., Report and Order*, 4 FCC Rcd 5960 (1989)(amendment of Part 22 of the Rules to allow construction prior to authorization subject to certain conditions) and 47 C.F.R. § 22.43(d)(2). Moreover, the proposed conditions reflect those circumstances most likely to extend the time needed to process a PPMS application. Two of the conditions merely reiterate existing requirements for Part 21 applicants. For example, Section §21.3(c) of the Rules requires that applicants determine the environmental impact of the proposed facilities before construction of a station is initiated. We propose that the applicant may not construct prior to receiving an authorization if the applicant determines that the facility may have a significant environmental effect. *See also* 47 C.F.R. § 1.1312. Similarly, Part 21 applicants are required to comply with Part 17 of the rules concerning the construction, marking, and lighting of antenna structures prior to initiation of construction, in order to ensure that such structures do not constitute a hazard to air navigation. *See* § 21.15(d).

7. *Modifications*. We invite comment as to whether PPMS applicants seeking modification of existing licenses pursuant to §§ 21.40 and 21.41 of our rules should similarly be permitted to begin construction prior to grant of the modification, subject to the same restrictions and conditions applicable to pre-authorization construction for initial PPMS applications.

8. *Defective Applications*. As provided in the conditions set forth above and in Section 21.20 of our rules, if an application is returned as unacceptable for filing, the applicant would not receive an authorization and would be required to halt construction of its station. Under the proposal, the applicant would also assume the risk for other defects, such as the antenna height being higher or lower than authorized, that may result in the tower having to be moved.

9. We recognize that there may be some situations not contemplated by this new rule where commencement of construction should not occur. Therefore, we propose that the Commission order that construction not commence or continue if the public interest justifies such action. *See* Appendix A, proposed rule §21.43(b)(2)(ii). We intend that this subsection only be used in cases where there is a likelihood that the constructed facility, if completed or operated, would violate the Communication Act or our rules or where it becomes evident for any reason that the authorization may not be granted. The order to cease construction activities would continue until we act on the application. We believe this additional safeguard will prevent any unanticipated problems which could arise under the new rule. Such circumstances would include instances in which an application is filed which is mutually exclusive with a previously filed application whose proposed facilities are being constructed prior to authorization. Where an applicant is served with a petition to deny, however, we would expect the applicant to halt preauthorization construction until the petition is resolved.

10. We emphasize that our proposed action does not change the requirement that PPMS applicants obtain grant of an authorization before beginning operation of facilities and we have included language in the proposed rules to clarify that point. *See* Appendix B, proposed rule § 21.43(b)(5). We note that any petition to deny an application must be resolved prior to grant of an authorization. *See* 47 U.S.C. § 309(d).

11. *McCaw Petition*. The petition filed by McCaw Cellular Communications seeks revision of Sections 21.707 and 21.708, which set forth procedures for obtaining an authorization to construct and operate facilities at temporary-fixed locations. Under those procedures, PPMS applicants may commence construction and operation for a period of less than 6 months upon at least 5 days' notice to the Commission, provided that prior frequency coordination is completed and that certain other conditions are met. 47 C.F.R. §§ 21.707 and 21.708. McCaw proposes that these sections be modified to permit PPMS applicants to use these temporary authorization procedures to obtain permanent authorization for PPMS facilities. Specifically, McCaw proposes that PPMS applicants either commence construction and operation under temporary-fixed authorization procedures, under which circumstances the applicant would be required to file FCC Form 494 within 30 days of the expiration of the 6 month period (or 5 months after commencement of operations), or commence construction and operation upon filing FCC Form 494. Under either procedure, a PPMS applicant would notify the Commission that it is seeking a permanent authorization at the expiration of a 6 month period of temporary operations. McCaw contends that its proposal is in the public interest because it would allow PPMS applicants to coordinate construction projects with those of other telecommunications services. This new flexibility would permit more eco-

nomical and efficient use of an applicant's resources, and would permit applicants to provide service more promptly to the public.

12. In support of its proposed revision, McCaw cites several instances in which the Commission has permitted construction of facilities prior to grant of an authorization. *See Amendment of Part 22 of the Commission's Rules to Allow Public Mobile Service Applicants to Commence Construction After Filing FCC Form 401, but Prior to Receiving an Authorization* ("*Part 22 Revision*"), 4 FCC Rcd 5960 (1989); *Amendment of Part 90 of the Commission's Rules to Implement a Conditional Authorization Procedure for Proposed Private Land Mobile Radio Service Stations* ("*Part 90 Revision*"), 4 FCC Rcd 8280 (1989); *Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services* ("*Part 25 Revision*"), 6 FCC Rcd 2806 (1991). These revisions generally accomplish the goal of the instant rulemaking proceeding, in that they permit applicants to begin construction prior to grant of a license to operate. Of the revisions cited, however, only the Part 90 revision permits applicants to operate prior to grant of a permanent authorization. Part 90 applicants may operate under a conditional authorization upon certification that the proposed facilities meet several specified conditions, similar to those proposed in this rulemaking. *Part 90 Revision* at 8280. In contrast to Part 90 applications, however, common carrier fixed point-to-point microwave applications are subject to § 309 of the Act, which imposes a 30 day public notice and comment period on applications for permanent authorizations, and limits temporary authorizations to extraordinary circumstances for a period not to exceed 180 days. 47 U.S.C. § 309(f).

13. While we recognize that frequency conflicts and other issues are often resolved by PPMS applicants with minimal Commission intervention, at this time we cannot conclude that such matters are sufficiently routine to permit applicants to go forward with operations prior to the expiration of a public notice and comment period or prior to the grant of an authorization. Comments filed in response to the McCaw petition persuade us that the ultimate goal of the McCaw proposal, expedited delivery of PPMS to the public, would be better served where staff processing and the initial notice and comment period take place prior to the commencement of operations.

14. PPMS applicants may now operate facilities prior to grant of a permanent authorization by requesting Special Temporary Authorization where the applicant can show that there are extraordinary circumstances requiring operation in the public interest and that delay would seriously prejudice the public interest. 47 U.S.C. § 309(f); 47 C.F.R. 21.25. As noted in McCaw's proposal, PPMS rules also accommodate applicants whose need for PPMS service is sufficiently limited to require only temporary authorization (less than 180 days). 47 U.S.C. § 309(f); 47 C.F.R. §§ 21.707 and 21.708. Nevertheless, PPMS applications are generally not appropriate for preauthorization operation due to the complex nature of the PPMS and the potential for unacceptable frequency interference. As pointed out in comments by the Spectrum Managers Association, because the PPMS allows use of the same frequency several times over in the same geographic area, PPMS users rely upon the public notice and comment period to verify that the prior coordinated frequencies are indeed the frequencies identified on the subject application. Under the McCaw proposal, other users of the spectrum allocated to PPMS would be able to compare prior coordinated frequencies with those requested in the application only after an applicant has commenced operations of proposed facilities; those users may wait as long as five months before the application appears on public notice. Parties wishing to oppose grant of an authorization for facilities proposed in the PPMS would similarly be obliged to wait as long as five months (when an application for permanent authorization of temporary facilities appears on public notice) before filing petitions alleging harmful interference or other problems with operating the proposed facilities. In view of concerns expressed in response to the McCaw proceeding regarding frequency coordination, we tentatively conclude that our proposal to eliminate the preconstruction authorization requirement for PPMS addresses the ultimate goal of the McCaw petition -- expedited delivery of PPMS -- without undue infringement on the integrity of the frequency coordination process and without otherwise compromising PPMS. We request comment on our tentative conclusion.

15. *FCC Form 494A.* We also propose in this proceeding to eliminate FCC Form 494A (Certification of Completion of Construction) for PPMS applicants and the requirement that PPMS applicants notify the Commission upon completion of construction of proposed facilities. Accordingly, the new rules would permit a PPMS applicant to commence operations following grant of a conditional license or other authorization, without further notification to the Commission. This reporting requirement would also be eliminated for modifications to PPMS facilities under Sections 21.40 and 21.41 of our rules. 47 C.F.R. §§ 21.40 and 21.41.

16. FCC Form 494A is currently used to notify the Commission of construction completion of construction or modifications of facilities and the date of expected commencement of operations. FCC Form 494A was created to serve as a means to inform the Commission and others that a microwave station is operational and has not been abandoned. *Notice of Proposed Rulemaking in the Matter of Revision of Part 21 of the Commission's Rules*, 104 FCC 2d 116, 119 (1986). We have not found the information reported on FCC Form 494A to be essential for processing PPMS applications, and we have observed few instances in which construction of PPMS facilities was completed at variance with the original proposal or the proposal as modified. Moreover, it appears that existing rules provide sufficient enforcement mechanisms against applicants who do not construct or operate their facilities consistent with their authorizations. For example, Commission rules provide that a license will be automatically forfeited if construction is not completed by the date specified in the license as the termination date of the construction period. 47 C.F.R. §§ 21.43(a) and 21.44. In addition, a frequency authorization may be cancelled or deleted from a license for failure to render service as authorized during a consecutive period of twelve months at any time after completion of construction or if removal of equipment or facilities has rendered the station not operational. 47 C.F.R. § 21.303(d). As currently required under our rules, 47 C.F.R § 21.43, the applicant would file for an extension (FCC Form 701) or submit its license for cancellation if construction were not completed by the end of the conditional license term. Notwithstanding these safeguards against an applicant's failure to construct, it is possible that the elimination of FCC Form 494A could leave the public without

adequate notice of which facilities have actually been constructed, or could result in the warehousing of frequencies through failure to construct facilities or submit unused frequencies for cancellation. In light of these considerations, we request comment on whether the use of FCC Form 494A should be eliminated for PPMS applicants.

17. Consistent with the elimination of Form 494A, we propose to reduce the construction period for PPMS conditional licensees from eighteen (18) months to six (6) months. This change should not significantly affect PPMS applicants since most complete construction within a few months of grant of an authorization, and is appropriate in light of our proposal to permit PPMS applicants to begin construction prior to grant of an authorization. We expect that there would be few instances in which extensions of time to construct would be required given PPMS applicants' expressed need for swift delivery of service to the public.

18. *FCC Form 430.* We propose to eliminate the requirement that Part 21 applicants use FCC Form 430 to report licensee qualification information. Part 21 applicants would no longer file FCC Form 430, but would instead report licensee qualification information on FCC Form 494 (Application for New or Modified Microwave Radio Station License under Part 21), or in a letter to the Commission if there have been no changes in any required information. We propose to revise FCC Form 494 to incorporate licensee qualification information. *See* Appendix D.

19. *FCC Forms 702 and 704.* We propose to streamline reporting requirements related to assignments or transfers of control of Part 21 licenses by combining FCC Form 702 (Application for Consent to Assignment of Radio Station Construction Authorization or License) and FCC Form 704 (Application for Consent to Transfer of Control). A new Form 705 would be used to report information currently requested on FCC Forms 702 and 704. *See* Appendix D. The new FCC Form 705 will eliminate currently duplicative reporting requirements and reduce staff inquiries on the use of the two forms. We further propose to extend the period for consummating assignments or transfers of control to 60 days from the current 45 days after Commission authorization, consistent with the time allocated for such consummations by other services which use FCC Forms 702 and 704.

20. Finally, we request comments on how the FCC rules and forms should be modified to reflect the proposed rule change. The comments should take into account that the Commission must also consider appropriate adjustments in fee schedules consistent with changes in FCC forms and reporting requirements.

## CONCLUSION

21. This rulemaking is proposed to allow PPMS applicants to respond more efficiently to increased demands for rapid delivery of service, and to help promote greater efficiency consistent with our goals of increasing efficient spectrum allocation and utilization and the elimination of unnecessary regulations. The proposed rules would enable PPMS applicants engaging in pre-authorization construction to more effectively coordinate and consolidate their construction projects with those of other microwave radio services. Moreover, the proposed rules should reduce burdens on the staff as well as the public by eliminating the confusion and duplication now associated with filing separate forms to report the information requested on FCC Forms 702 and 704. Finally, the elimination of the specified reporting requirements will reduce the filing burden on all PPMS and Part 21 applicants.

## OTHER MATTERS

22. *Ex Parte Presentations.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

23. *Regulatory Flexibility Act Initial Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA, on which written public comments are requested, is set forth in Appendix B. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis.

24. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

25. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before March 16, 1993, and reply comments on or before April 16, 1993. To file formally in this proceeding, you must file any original and five copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, 1919 M St. N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

## ORDERING CLAUSES

Accordingly, pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303, that there is ISSUED A NOTICE OF PROPOSED RULEMAKING as hereby provided above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX A

### Proposed Rule Section

Part 21 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 21 continues to read as follows:

**AUTHORITY Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.**

2. Section 21.7 is revised to read:

§ 21.7 Standard application form for domestic public fixed radio service licenses.

FCC Form 494 ("Application for a New and Modified Microwave Radio Station License under Part 21") must be submitted and a license granted for each station prior to commencement of any proposed station construction, except as otherwise provided in § 21.43(c). FCC Form 494 also must be submitted to amend any license application, to modify any license pursuant to §§ 21.40(a) and 21.41, to notify the Commission of modifications made pursuant to § 21.42, to delete licensed facilities, and to notify the Commission of any changes in licensee qualification information.

3. Section 21.11 is revised to read:

**§ 21.11 Miscellaneous forms shared by all domestic public radio services.**

(a) *Licensee qualifications.* FCC Form 494 ("Application for New or Modified Microwave Radio Application") must be filed to notify the Commission of any changes in licensee qualification information within 30 days of the change.

(b) ***

(c) ***

(d) *Assignment of license.* FCC Form 705 ("Application for Consent to Assignment or for Transfer of Control of Radio Station Construction Authorization or License"), must be submitted to assign voluntarily (for example, contract) or involuntarily (for example, death, bankruptcy, or legal disability) the station authorization. In the case of involuntary assignment, the application must be filed within 10 days of the event causing the assignment. FCC Form 705 must also be used for non-substantial *(pro forma)* assignments. Whenever a group of station licenses in the same radio service is to be assigned to a single assignee, a single "blanket" application may be filed to cover the entire group, if the application identifies each station by call sign and station location and if two copies are provided for each station affected. The assignment must be completed within 60 days from the date of authorization. Upon consummation of an approved assignment, the Commission must be notified by letter of the date of consummation within 10 days of its occurrence.

(e) ***

(f) *Transfer of control of corporation holding an authorization or license.* FCC Form 705 ("Application for Consent to Assignment or for Transfer of Control of Radio Station Construction Authorization or License"), must be submitted in order to voluntarily or involuntarily transfer control (*de jure* or *de facto)* of a corporation holding any construction authorizations or licenses. In the case of involuntary transfer of control, the application must be filed within 10 days of the event causing the transfer of control. FCC Form 705 must also be used for non-substantial *(pro forma)* transfers of control. The transfer must be completed within 60 days from the date of authorization. Upon consummation of an approved transfer, the Commission must be notified by letter of the date of consummation within 10 days of its occurrence.

4. Section 21.43 is revised to read:

**Section 21.43. Period of construction.**

(a) Each license for a radio station for the services included in this Part shall specify as a condition therein the period during which construction of facilities must be completed and the station made ready for operation. Construction may not commence until the grant of a license, except as otherwise provided in this section, and must be completed by the date specified in the license as the termination date of the construction period. Except as may be limited by §21.45(b) or otherwise determined by the Commission for any particular application, the following will be the maximum construction periods for each service:

(1) For stations in the Digital Electronic Message Service, a maximum of 18 months from the date of the license grant.

(2) For stations in the Point-to-Point Microwave Radio Service, a maximum of 6 months from the date of the license grant.

(3) For all other stations licensed under this Part, a maximum of 12 months from the date of the license grant.

(b) Each license for a radio station for the services included in this part, except licenses for radio stations in the Point-to-Point Microwave Radio Service, shall also specify as a condition therein that upon the completion of construction, each licensee must file with the Commission a certification of completion of construction using FCC Form 494A, certifying that the facilities as authorized have been completed and that the station is now operational and ready to provide service to the public, and will remain operational during the license period, unless the license is submitted for cancellation.

(c) *Commencing construction prior to grant of a radio station authorization.*

(1) *Scope.* Section 21.43(c) applies to all Point-to-Point Microwave Radio Service (PPMS) applicants as defined in §21.2, including:

(i) Applicants for an initial station authorization in the PPMS;

(ii) Applicants for facility modifications in the PPMS, pursuant to §§21.40 and 21.41 this Part;

(iii) Applicants to amend pending initial applications in the PPMS.

(2)(i) *General rule.* After the applicant has filed a Form 494 with the Commission, provided that the requirements of paragraph (c)(3) have been met, the applicant may commence construction.

(ii) Notwithstanding any provision of paragraph(c), if the Commission for any reason determines that construction should not commence or should be terminated pending the grant of an authorization, the

applicant must immediately cease construction upon notification from the Commission. Notification may be made in writing or orally followed with a written confirmation. The Commission, at its discretion, may allow recommencement of construction after it determines, in writing, the reason for making such notification no longer exists.

(3) *Conditions.* An applicant may not commence or continue construction prior to the grant of an authorization as long as any of the following conditions persist:

(i) The application is mutually exclusive with a previously filed application or authorized station, or a petition to deny has been filed against the application;

(ii) The applicant requests a waiver of a Commission rule pursuant to §21.19 of this Part;

(iii) The application is returned as unacceptable for filing pursuant to § 21.20 of this Part;

(iv) The applicant, where required (and not exempted under §17.14 of this Chapter), has not filed a notice of proposed construction with the FAA and received a determination from the FAA that the proposed antenna structure would pose no hazard to aviation, and has not received a determination from the Commission as to any required antenna structure marking and lighting specifications;

(v) The applicant has not taken all of the following steps: (A) considered whether the proposed facility may have a significant environmental effect pursuant to §§ 1.1301 through 1.1319 of Part 1; (B) determined that the proposed facility will not have such an effect; and (C) indicated this determination on the Form 494;

(vi) The proposed facility is within 56.3 kilometers (35 miles) of the U.S.-Canadian or U.S.-Mexican border, or is otherwise subject to a treaty or agreement between the United States and Canada or the United States and Mexico regarding frequency coordination, or both.

(4) Applicants who commence construction, prior to receiving an authorization pursuant to this paragraph (c), assume the risk of and have no recourse against the United States on account of:

(i) not receiving an authorization;

(ii) errors and time lags in the public notice system;

(iii) having to alter, relocate or dismantle the facility; and

(iv) incurring whatever costs may be necessary to bring the facility into compliance with applicable laws and regulations.

(5) Applicants constructing facilities without prior Commission authorization pursuant to paragraph (c) must not commence operating such facilities until after the Commission grants an authorization.

## APPENDIX B

## INITIAL REGULATORY FLEXIBILITY ANALYSIS

**Reasons for Action:**

The Commission is proposing to remove the requirement that PPMS applicants receive an authorization prior to the construction of facilities.

**Objectives:**

The objective of this proposal is to give applicants greater flexibility in scheduling construction and enable licensees to begin providing service to the public more quickly. The proposed rule may also result in reduced costs for both the licensees and the public. The rule would also help further the Commission's goal of eliminating unnecessary regulation.

**Legal Basis:**

The proposed action is authorized under Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303.

**Reporting, Recordkeeping and other Compliance Requirements:**

None.

**Federal Rules which Overlap, Duplicate or Conflict with these Rules:**

None.

**Description, potential impact and number of small entities involved:**

This Notice of Proposed Rulemaking will have a minimum impact on small entities by providing them with increased flexibility in the scheduling and consolidation of construction projects thereby reducing construction costs and expediting the initiation of service to the public by Point-to-Point Microwave Radio Service licensees.

**Any significant alternative minimizing impact on small entities and consistent with stated objectives:**

None.

## APPENDIX C

**McCaw Cellular Communications**

**Petition for Rulemaking, RM No. 7861**

**Comments**

Advanced Telecommunications Corporation
American Telephone and Telegraph Company
Cellular Telecommunications Industry Association
Centel Cellular Company
Digital Microwave Corporation
IDB Communications Group, Inc.
GTE Service Corporation

Harris Corporation - Farinon Division
Local Area Telecommunications, Inc.
National Spectrum Managers Association, Inc.
Nynex Mobile Communications Company
OCOM Corporation
Pacific Telesis Group
Western Tele-Communications, Inc.
U.S. West Newvector Group

**Reply Comments**
McCaw Cellular Communications
National Spectrum Managers Association
Southwestern Bell Telephone Company

FCC 494

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Approved by OMB
3060-XXXX
Expires XX/XX/XX
Est. Avg. Hrs. Per Response: 2.5 Hrs.

Instructions for Completion of FCC 494 Form

# APPLICATION FOR NEW OR MODIFIED MICROWAVE RADIO STATION LICENSE UNDER PART 21

## General Information and Instructions

A. FCC Form 494 is to be used to:
(1) Apply for a license for a new radio station;
(2) Amend a pending license application;
(3) Modify a granted license pursuant to Section 21.40 or 21.41 of the Commission's Rules; and
(4) Notify the Commission of modifications of a radio station made pursuant to Section 21.42 of the Commission's Rules.

**FCC Form 494 consists of two sections: Section I is the fee portion; Section II is the application portion.**

B. Before this application is prepared, the applicant should refer to Parts 1 and 21 of the Rules and Regulations of the Commission, (Title 47, Code of Federal Regulations (CFR), Parts 1 and 21), copies of which may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. Part 21 may require information to be filed with an application in addition to that specified in the application form. Applicant should make every effort to file a complete application in compliance with the Rules. Failure to do so can result in rejection or return of the application or a delay in the processing of the application.

C. Except as noted below, reference to information already on file with the Commission can be made where the documents or information required to be filed as exhibits are already on file with the Commission. References to station files or or applications should include call signs and file numbers, and references to docketed proceedings should include the title of the proceeding and the docket number. All information so referenced must be current and accurate as of the date of filing. References to information on file shall not be made for items 1 through 10 or those other items which require only a brief answer to be entered on the form itself. See 47 CFR Section 1.65 for updating requirements.

D. Information filed with the Commission must be kept current. The applicant should notify the Commission regarding any material change in the facts as they appear in the application.

E. All entries on the form shall be typed or legibly printed in ink. A separate application must be submitted for each radio station in each service or class of station. Submit an original and one copy of the application (SIGN ORIGINAL COPY ONLY). Nonfeeable applications may be sent directly to the Federal Communications Commission, Washington, DC 20554-1600. See instruction F below for applications subject to fees.

## F. Instructions for Completing Section I (Fee Portion)

Part I must be completed. If you are applying for concurrent actions which require you to list more than one Fee Type Code, you must also complete Part II. Please type or print legibly. All required blocks must be completed or application/filing will be returned without action.

1. "Applicant Name" - Enter the name (last, first, middle initial) of the applicant. If company, enter name which is used commercially.
2. "Mailing Address (Line 1)" - Enter the street address or post office box number to which the applicant wishes correspondence sent.
3. "Mailing Address (Line 2)" - This line may be used for further identification of the address if additional space is required.
4. "City" - Enter the name of the city associated with the given street address.
5. "State or Country" - Enter the appropriate two-digit state abbreviation as prescribed by the U.S. Postal Service. If address is foreign, enter the appropriate country name here.
6. "ZIP Code" - Enter the appropriate five or nine-digit ZIP code prescribed by the U.S. Postal Service.
7. "Call Sign or Other FCC Identifier" - Enter an applicable call sign or unique FCC Identifier, if any, as shown on your attached application. If applying for service affecting more than one call sign, enter one call sign only.
8. Column (A), "Fee Type Code" - Enter correct Fee Type Code(s) from the Common Carrier Services Fee Filing Guide. Inaccurate or erroneous Fee Type Codes may result in your application or filing being returned to

you without further processing.

9. Column (B), "Fee Multiple" - Your submission may request action with respect to more than one station, license, frequency or party and can be submitted together with one check if they meet specific conditions. This column is used only if a multiple, i.e., two or more, is being applied for. Refer to the Common Carrier Services Fee Filing Guide for additional information.

10. Column (C), "Fee Due for Fee Type Code in Column (A)"- Enter in this block the amount of the fee associated with the Fee Type Code shown in Column (A) (times (x) the fee multiple, if required).

11. "Total Amount Remitted With This Application or Filing" - Enter the total of lines (1) through (5) of Column (C). This amount should equal the amount of your check or money order. We will not accept multiple checks.

**How to Submit Applications**

An original and one copy of completed application must be submitted. Required copies of applications should be clearly identified as "duplicate copy" and placed behind the original package. A copy of an application submitted for receipt purposes only should be placed at the bottom of the submission. Extraneous material and extra copies should be avoided at all times. Failure to abide by these instructions will delay the processing of your submission or will result in return of the application without action.

**Mailing Instructions**

Completed applications should be mailed to the proper address as shown in the Common Carrier Services Fee Filing Guide. Applications which are properly addressed to the appropriate P.O. Box number may also be hand delivered to the following address: **Federal Communications Commission, c/o Mellon Bank, Three Mellon Bank Center, 525 William Penn Way, 27th Floor, Room 153-2713, Pittsburgh, Pennsylvania, (Attention: Wholesale Lockbox Shift Supervisor).**

Applications received before midnight on a normal business day will receive that day's date as the receipt date. Deliveries made after midnight on Fridays will not be "officially" receipted until the next Monday. Applications received on weekends and government holidays are dated the next regular business day. A single check, bank draft or money order made payable to the **FEDERAL COMMUNICATIONS COMMISSION** and demoninated in U.S. dollars and drawn upon a U.S. financial institution must be included with each application requiring a fee. No postdated, altered or third-party checks will be accepted. **DO NOT SEND CASH.**

**G. Specific Instructions for Completing Section II (Application Portion)**

See instruction (H) below, "Special Instructions for Passive Facilities if a passive reflector or passive repeater is involved in the applicant's proposal.

See instruction (I) below, "Special Instructions for Block Assignments," if the applicant's proposal involves a range of frequencies for general use in a specified geographical area.

See instruction (J) below, "Special Instructions for Modification of Conditional License," if the applicant proposes to modify a conditional license.

If more space is needed than is allocated in items 7 through 10, the applicant should use as many copies of page 1 of this form as are needed to contain the data.

Item 1. Name of applicant should be the same as reported in FCC Form 430, "Licensee Qualification Report," or as reported previously in Item 29. The address listed may vary from that reported previously if the address of the corporate officer, or other employee authorized to certify this application, differs from that of the applicant's principal office.

Item 3. The following codes should be used:

(a) Service applied for (use one code only):

CF - Point-to-Point Microwave Radio Service
CM - Multipoint Distribution Service
CT - Local Television Transmission Service
CE - Digital Electronic Message Service
CZ- Fixed Subsidiary Communications Authorization (Fixed SCA)

(b) Type of Use (use one or more codes as applicable):

TE - Message/Private Line/Data (telephone carriers)

SC - Message/Private Line/Data (other carriers)
CA - Television relay for CATV systems
TV - Television relay for other than CATV use
OW - Order wire and alarm

(c) Class of Station (use one code only):

BFX - Booster Station, Fixed (MDS)
FX - Fixed
TF - Temporary Fixed
MO - Mobile (TV Pickup)
DFX - Developmental (Fixed)
DTF - Developmental (Temporary Fixed)
DMO - Developmental (Mobile TV Pickup)

(d) Nature of application (use one or more codes as applicable):

NS - Construct new transmit station (If this code is used, no other code is necessary, except PR where applicable.)
AP - Add new point of communication (If this code is used, codes AF, AT and AA are not needed to indicate the addition of those facilities needed to communicate with the new point of communication.)
CL - Change location of transmit station or MDS booster (If transmit station name (item 7(a)) is changed, code CN must also be used.)
LR - Change location of receive station or passive facility
AF - Add frequency
PR - Construct passive reflector or passive repeater
PS - Power split of previously authorized transmitter(s)
AT - Add transmitter
RT - Replace transmitter (If this code is used, it is not necessary to use codes CE, DP and IP to indicate changes in emission designator or power output/EIRP resulting from the change of transmitter.)
CC - Correct transmit station coordinates
RC - Correct coordinates of receive-only station or passive facility
CE - Change emission designator
CF - Change frequency
CX - Change polarization
DP - Decrease power
IP - Increase power
IX - Increase transmit antenna structure height
IR - Increase receive-only antenna structure height
DX - Decrease transmit antenna structure height
DR - Decrease receive-only antenna structure height
AA - Add antenna
MA - Move antenna
RA - Replace antenna
CN - Change name of transmit station
OT - Other changes (Explain in response to item 21.)

Item 4. For Point-to-Point and Digital Electronic Message Services only, multiple applications may be submitted as a set. If so, the applications must be arranged in some logical order by the applicant and each application assigned a number in consecutive order beginning with the number "1". The number "1" application is the lead application and should contain all the general information regarding the overall proposal. Therefore, after the item is answered in the lead application for all of the applications in the set, applicants do not have to answer on the other applications in that particular set, items 20, 21, 22, 23, 24, 25, 26 and 27

Item 5. Give the estimated time in months after grant date needed to complete the construction proposed in this application.

Item 6. See paragraph (J) "Special Instructions for Modification of Conditional License."

Item 7. Transmit Station Information:

(a) Station name - If an authorized station, give the name appearing on an FCC authorization. If a new station is proposed, give it a name which relates the station to its location. The name of a city, statistical area, town, prominent geographical feature (e.g., "Bald Mtn"), etc., may be used. The name should be abbreviated, if necessary, without punctuation, so as not to exceed 11 characters.

(b) Street - Street address or distance and direction from town shown in (c).

(c) City - If not in a city or town, insert the name of the nearest identifiable community.

(d) State (or territory) - Use the following two-letter abbreviations specified by the U.S. Postal Service:

| | | | |
|---|---|---|---|
| Alabama | AL | Missouri | MO |
| Alaska | AK | Montana | MT |
| Arizona | AZ | Nebraska | NE |
| Arkansas | AR | Nevada | NV |
| California | CA | New Hampshire | NH |
| Canal Zone | CZ | New Jersey | NJ |
| Colorado | CO | New Mexico | NM |
| Connecticut | CT | New York | NY |
| Delaware | DE | North Carolina | NC |
| District of Columbia | DC | North Dakota | ND |
| Florida | FL | Ohio | OH |
| Georgia | GA | Oklahoma | OK |
| Guam | GU | Oregon | OR |
| Hawaii | HI | Pennsylvania | PA |
| Idaho | ID | Puerto Rico | PR |
| Illinois | IL | Rhode Island | RI |
| Indiana | IN | South Carolina | SC |
| Iowa | IA | South Dakota | SD |
| Kansas | KS | Tennessee | TN |
| Kentucky | KY | Texas | TX |
| Louisiana | LA | Utah | UT |
| Maine | ME | Vermont | VT |
| Maryland | MD | Virginia | VA |
| Massachusetts | MA | Virgin Islands | VI |
| Michigan | MI | Washington | WA |
| Minnesota | MN | West Virginia | WV |
| Mississippi | MS | Wisconsin | WI |
| | | Wyoming | WY |

Use the following abbreviations for stations located offshore:

| | |
|---|---|
| Atlantic Ocean | AO |
| Gulf of Mexico | GM |
| Pacific Ocean | PO |

(e) County - Name of county. A county is considered to be the first order subdivision of each state or territory regardless of their local designations (eg., parish, borough, district, etc.). Independent cities and Washington, D.C. are considered as county equivalents. (Must use spelling as appears in *FIPS PUB 6-4*, Counties and Equivalent Entities of the U.S., Its Possessions and Associated Areas (Aug. 31, 1990), which is published by Federal Information Processing Standards (FIPS), National Computer Systems Laboratory, National Bureau of Standards, Department of Commerce.

(f) Antenna structure height - The height in feet and meters of the antenna structure above ground level including building or similar structure (if any), tower, mast, pole, pipe, obstruction lights, lightning rods, or transmit or receive antennas, and any additions to an existing antenna structure.

(g) Building height - Height in feet and meters above ground to the highest part of building (roof, penthouse, vent, chimney, railings, stacks, etc.). If antenna structure is not mounted on a building or similar structure, leave this space blank.

(h) Ground elevation - The elevation of the ground beneath the antenna in feet and meters above mean sea level.

(i) Service area - This should be answered only for applications involving the Multipoint Distribution Service, Digital Electronic Message Service, temporary fixed facilities, Mobile-TV Pickup facilities, or a rectangular service area. Give the name of the major city, town, statistical area or other geographic area where service is to be provided, unless it is a statistical area where you must give first name of statistical area for Multichannel MDS applications.

(j) Latitude and (k) Longitude - Geographical coordinates should be given in degrees, minutes and seconds and should be rounded off to the nearest second.

m 8. Frequency Path Information:

This item should be filled out in the following instances:

(1) *For the addition of a new frequency path*, place an "A" in column (n). Insert appropriate data in all columns on that line.

(2) *For the modification of a licensed frequency path*, insert an "M" in column (n). Columns (a) and (c) must be answered to identify the frequency path involved, and only the new or revised data inserted in the appropriate columns. If an antenna is being replaced or the height of the antenna is being changed, use only one line entry containing one frequency which is presently licensed to use the antenna involved. However, if a change in antenna height will change the line loss previously submitted, it will be necessary to show all frequencies affected and insert the new line loss figure in column (e). If a frequency or polarization is being changed, it will be necessary to treat the change as a deletion of the old frequency path and the addition of a new frequency path.

(3) *For the deletion of a licensed frequency path*, answer columns (a) and (c) and insert a "D" in column (n).

(a) Frequency and polarization - Give the carrier frequency in MHz on which the transmitter will operate. The frequency should be followed by one of the following codes to indicate the type of polarization:

H - horizontal polarization
V - vertical polarization
R - polarization 45° clockwise from vertical as seen when looking from transmit antenna toward receive antenna
L - polarization 45° counterclockwise from vertical as seen when looking from transmit antenna toward receive antenna

(b) Transmitter number - See instruction for item 10(a). Insert the number from item 10(a) which identifies the transmitter operating on the frequency in item 8(a).

(c) Receive station name - See instruction for item 9(a). Insert the name from item 9(a) which identifies the receive station or passive facility. If this is an existing or authorized facility, it must be identified by the name appearing on the FCC authorization.

(d) Operation code - Use one of the following codes to indicate the transmitter configuration for the frequency in item 8(a) (if no code applies, leave this item blank):

PS - Power split
HS - Hot standby
PC - Protected configuration (phase-locked transmitters)
PH - Power split, hot standby
PP - Power split, protected configuration
CS - Cold standby
XX - To remove existing operational code configuration

(e) Line loss - Give the approximate attenuation, including any padding, to the nearest dB, between the point at which the power output of the transmitter is measured for type-acceptance/modification approval and the input to the antenna. If this figure is less than 1 dB, this item may be left blank. For power splits, the power reduction for a particular path will be considered line loss.

(f) Primary antenna code - Use the FCC I.D. This code will represent the primary transmitting antenna. When a new or replacement antenna is proposed, a number between 1 and 99 should be assigned which will correspond to the antenna code in item 11(a).

(g) Primary antenna height - The height in feet and meters (rounded to next highest foot and meter) above ground level of the center of radiation of the primary transmitting antenna.

(h) Diversity antenna code - This is the code representing the diversity transmitting antenna. (Enter XXXXXX for removal of existing diversity antennas.)

(i) Diversity antenna height - The height in feet and meters (rounded to the next highest foot) above ground level of the center of radiation of the diversity antenna.

(j), (k), (l) and (m) - The instructions for these items are identical to those for the transmitting antennas at (f), (g), (h) and (i) except that these items are for the primary and diversity receiving antennas at the receiver station.

(n) Action code - This column should contain an "A" (Add), "D" (Delete) or "M" (Modify).

Item 9. Receive Station Information:

If the information requested in this item has previously been supplied on an FCC 494 form, it need not be filled out except:

(1) *For the addition of a new point of communications,* place an "A" in column 9(l).

(2) *For the modification of license regarding a point of communications,* answer item 9(a), 9(b), 9(c), 9(d) and insert an "M" in column 9(l). Any data associated with this site which is to be modified should be placed in the appropriate column on the same line.

(3) *For the relocation and change of name of a licensed receive facility,* identify the old receive facility name in column 9(a), complete 9(b), 9(c), 9(d), and insert a "D" in column 9(l), on the same line. The new name for the receive facility and its associated data must be placed on a separate line under item 9 and an "A" inserted in column 9(l). All frequency path information associated with this new point of communications should be inserted in item 8.

(4) *For the deletion of a licensed receive facility,* identify the receive facility in column 9(a), complete 9(b), 9(c), 9(d), and place a "D" in column 9(l). Provide frequency and polarity and receive station name in items 8(a) and 8(c), and place a "D" in column 8(n).

(a) Receive station name - Give the name of the receive station or receive facility. If a radio path includes a passive reflector or passive repeater, the name used here is that of the passive facility. Choose the name in the same manner as the transmit station name, item 7(a). As in item 7(a), the maximum name length is 11 characters.

(b) State - See instruction for item 7(d).

(c) Call sign - Insert the carrier microwave radio station call sign of the receive station, if any. Do not use the call sign of a station in any other radio service. If the receive station is a receive-only station for the transmit station in item 7, but is also a transmit station, give its call sign.

(d) Type of facility - Indicate the type of facility that the receive facility represents by using one of the following codes:

TS - Transmit station
RO - Receive-only station
RF - Passive reflector
PR - Passive repeater (back-to-back parabolic antennas)

(e) Path distance - Give the distance from the transmit station to the receive station (or passive facility) in kilometers rounded off to the nearest 1/10th kilometer.

(f) Path Azimuth - Give the direction from the transmit station to the receive station (or passive facility) with respect to True North to the nearest 1/10th degree.

(g) Latitude and (h) Longitude - Give the geographical coordinates of the receive station (or passive facility) in degrees, minutes and seconds (rounded off to the nearest second).

(i), (j), and (k) - These instructions are identical to 7(h), 7(f), and 7(g) respectively, except that the data requested is for the receive facility.

(l) Action code - Insert an "A" only in the case of a new receive station. Insert a "D" if the receive station and all communicating frequencies are to be deleted. Insert an "M" if data concerning a licensed receive facility is being modified.

Item 10. Transmitter Information:

If transmitters are being modified or replaced, they should be handled as deletions and additions of transmitters. All frequency paths associated with the added transmitters or power split transmitters should be identified in Item 8.

(a) Transmitter number - Assign an identifying number (between 1 and 99) to each line entry and use this number in item 8(b) to identify the equipment operating on the frequency contained in item 8(a). A separate line entry should be made for each type of transmitter proposed.

(b) Transmitter code - Use the last six characters (omit the hyphen) of the FCC Internal Identifier. If a code number is not yet assigned, leave this item blank.

(c) Quantity - Insert the number of transmitters of this type proposed by this application. If no transmitters are being added to those already licensed, insert a zero. If a "D" is placed in item 10(j), the number of transmitters being deleted is inserted in this item. (For each frequency path with an operation code of PC or HS, there should be at least two transmitters for that path.)

(d) Name of manufacturer - Give the name of the transmitter manufacturer; abbreviate if necessary.

(e) Type or model number - Give the type number of the transmitter as it appears in the FCC equipment list, "Radio Equipment List - Equipment Acceptable for Licensing".

(f) Power - Give the nominal power output of the transmitter (i.e., the power at which it will be operated), or for MDS, give equivalent isotropically radiated power (EIRP). This figure may not exceed the power output as type accepted and is measured at the same point as for type acceptance, or for MDS, may not exceed prescribed EIRP.

(g) Emission designator - Give the emission designator for the transmitter. Normally, this is the same as the type accepted/notification value.

(h) Frequency stability - This is the frequency stability (in percent) of the transmitter under the conditions in which it will be operated. Normally, this is the same as the type accepted/notification value. If MDS, tell whether or not ±1 KHz.

(i) Module code - This is the code number of an amplifier or other type of module which is not a complete transmitter but is type accepted by the Commission to be used in conjunction with or in lieu of certain elements of a transmitter. Where a module code is listed in column (i), there should be a corresponding number entered on another line in column (b) to refer to the equipment which is being used. If some transmitters of a given type are used with modules and some are not, they should be listed on separate lines. If the module code number is not known, use a number between 1 and 99 to link the module to the transmitter with which it is used. When a module is used with a transmitter, the output power, or EIRP for MDS, frequency stability and emission designator on the line with the transmitter should be for the entire transmitting package (transmitter and module). Columns (f), (g) and (h) may be left blank on the line containing the module entry.

(j) Action code - This column should contain either an "A" or "D". An "A" will indicate that the number and type of transmitters on that line are being added to the license. A "D" will indicate that the number and type of transmitters on that line are being deleted from the license. See the first paragraph under item 8 above. Insert appropriate data in all columns on that line.

Item 11. Antenna Information:

This item shall be completed only for new or replacement antennas.

(a) Antenna Code - Use the FCC I.D. If a code is not yet assigned, a number between 1 and 99 should be assigned to the antenna. This number must be used in items 8(f), 8(h), 8(j) or 8(l), as appropriate, in order to associate the antenna with its frequency path.

(b) Name of manufacturer - Give the name of the antenna manufacturer; abbreviate if necessary.

(c) Type or model number - Give the model number of the antenna as it appears on the FCC antenna list. If not on the list, give the manufacturer's model number.

(d) Beam tilt - This item applies only to an applicant in the Multipoint Distribution Service or Digital Electronic Message Service using either mechanical or electrical beam tilt. The answer should be accurate to the nearest 1/10th degree.

(e) Azimuth - This item applies only to an MDS applicant when employing a directional antenna. The orientation of the antenna, expressed in degree of azimuth, must be listed with respect to true north, accurate to the nearest degree.

Item 17. Multipoint Distribution Service (MDS).

(e) See 47 CFR Section 21.912.

(f)(1) See 47 CFR Sections 21.901 and 21.902. Note: On 20th day after filing application, ITFS Service Notice must be filed. If necessary, on the 90th day after filing application, ITFS Late Service Notice and ITFS Diligent Efforts Demonstration must be be filed.

(f)(3) See 47 CFR Sections 1.1621-1.1623.

Item ~~28.~~ 29. Licensee Qualification Report

(b) If FCC Form 430, "Licensee Qualification Report", has been previously filed, it need be updated only when the information presently on file is no longer substantially accurate and complete in all matters of decisional significance. Examples of significant types of changes which must be reported include: a change in control *(de jure* or *de facto)* of an applicant; a change in alien ownership or control which is significant under §310(a) of the Communications Act; or any conviction or administrative finding required to be reported under item ~~7 of FCC Form 430~~ 29(j).

Item ~~30.~~ 32. Certification of Person Responsible for Preparing Engineering Information Submitted in this Application.

The engineering certificate must be signed by the technically qualified person responsible for preparation of the engineering information. In this context a "technically qualified person" is a person qualified to calculate and determine the interference potential and the efficient utilization of the proposed radio frequencies and facilities, and is thoroughly familiar with the technical requirements as specified in the applicable parts of the Commission's Rules. Such engineering certification must be signed in the original for each application.

Item ~~31.~~ 33. Certification of Applicant.

Certification on behalf of the applicant shall be made personally by the individual applicant, a partner (if applicant is a partnership), a corporate officer or duly authorized employee (if applicant is a corporation) that has been specifically authorized to act for and on behalf of the applicant, or officer/member (if applicant is an unincorporated association). Note: The financial certification must be updated when this financial certification is no longer substantially accurate and complete.

H. *Special Instructions for Passive Facilities*

A separate page 1 of this form must be completed for each passive repeater or passive reflector facility used. If multiple passive reflectors are used and the reflectors are so close as to have the same geographical coordinates (when rounded to nearest second), such reflectors will be treated as a single facility. For the purpose of this form, passive facilities should be treated as active stations. Number the additional page as 1B (1C, 1D, etc., if there is more than one associated passive site) and attach it to the application form for the nearest active corresponding station, immediately following page 1, renumbered as page 1A of that application.

I. *Special Instructions for Block Assignments*

Where the application involves a range of frequencies for general use in a specified geographical area (including temporary fixed stations), the following special instructions apply:

Leave blank those items which are clearly inapplicable, such as, items 9 and 11.

Item 7(i). Name the city or describe the geographic or service area where facilities are to be used.

Item 7(j) and 7(k). Where the Rules specify a rectangular service area, give the maximum and minimum latitudes and longitudes.

Item 8(a). Give the lower limit of the frequency range followed by a dash (-) and the upper limit of the frequency range on the following line in item 8(a). Normally, polarization will not be specified.

J. *Special Instructions for Modification of Conditional License*

Item 3(d). Use the appropriate codes to indicate the changes in the terms of the license which are being requested.

Item 6. Complete this item if request is to amend an application, modify a license or to add an MDS booster station.

Specify in item 6(a)3. whether modification is pursuant to 47 CFR Section 21.40, or Section 21.41, or Section 21.42. In item 6(b), if this is an amendment to an application, provide file number of initial application. If this is a modification application, provide file number of initial application and give call sign of authorized station in 6(c). If this is an application for an MDS booster station, provide file number of initial application for main MDS transmitter station.

Item 7 through 14. Complete these items as though the application was an initial conditional license application. All data desired on the new authorization must be provided. All information on the outstanding conditional license which is not provided on this form will be deleted.

## NOTICE TO INDIVIDUALS

The solicitation of personal information requested in this form is authorized by the Communications Act of 1934, as amended. The Commission will use the information provided in this form to determine whether grant of this application is in the public interest. In reaching that determination, or for law enforcement purposes, it may become necessary to refer personal information contained in this form to another government agency. In addition, all information provided in this form will be available for public inspection. If information requested on the form is not provided, processing of the application may be delayed or the application may be returned without action pursuant to the Commission rules. Your response is required to obtain the requested authority.

Public reporting burden for this collection of information is estimated to average .25 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (3060-XXXX), Washington, DC 20503.

The foregoing Notice is required by the Privacy Act of 1974, P.L. 93-579, December 31, 1974, 5 U.S.C. 552a(eX3) and the Paperwork Reduction Act of 1980, P.L. 96-511, December 11, 1980, 44 U.S.C. 3504(cX3XC).

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Approved by OMB
3060-XXXX
Expires XX/XX/XX
Est. Avg. Hrs. Per Response: 2.5 Hrs.

FOR FCC USE ONLY

# FCC 494 – APPLICATION FOR A NEW OR MODIFIED MICROWAVE RADIO STATION LICENSE UNDER PART 21

READ INSTRUCTIONS BEFORE COMPLETING

## SECTION I (FEE PORTION)

PART I

APPLICANT NAME (Last, first, middle initial)

MAILING ADDRESS (Line 1) (Maximum 35 characters - refer to Instructions for Completing Section I, no. 2.

MAILING ADDRESS (Line 2) (if required) (Maximum 35 characters)

CITY

| STATE OR COUNTRY (if foreign address) | ZIP CODE | CALL SIGN | OTHER FCC IDENTIFIER |
|---|---|---|---|
| | | | |

Enter in Column (A) the correct Fee Type Code for the service you are applying for. Fee Type Codes may be found in the Common Carrier Services Fee Filing Guide. Enter in Column (B) the Fee Multiple, if applicable. Enter in Column (C) the result obtained from multiplying the value of the Fee Type Code in Column (A) by the number entered in Column (B), if any.

| | (A) FEE TYPE CODE | (B) FEE MULTIPLE (if required) | (C) FEE DUE FOR FEE TYPE CODE IN COLUMN (A) | FOR FCC USE ONLY |
|---|---|---|---|---|
| (1) | | | $ | |

PART II – To be used only when you are requesting concurrent actions which result in a requirement to list more than one Fee Type Code.

| | (A) FEE TYPE CODE | (B) FEE MULTIPLE (if required) | (C) FEE DUE FOR FEE TYPE CODE IN COLUMN (A) | FOR FCC USE ONLY |
|---|---|---|---|---|
| (2) | | | $ | |
| (3) | | | $ | |
| (4) | | | $ | |
| (5) | | | $ | |

ADD ALL AMOUNTS SHOWN IN COLUMN C, LINES (1) THROUGH (5), AND ENTER THE TOTAL HERE. THIS AMOUNT SHOULD EQUAL YOUR ENCLOSED REMITTANCE. →

| TOTAL AMOUNT REMITTED WITH THIS APPLICATION OR FILING | FOR FCC USE ONLY |
|---|---|
| $ | |

FCC 494
JANUARY 1993

## SECTION II (Application Portion)

| FCC Use Only | |
|---|---|
| Service | File No. and Call Sign |

| 1. Name of Applicant | 2. (Area Code) Telephone No. |
|---|---|
| Mailing Street Address or P.O. Box, City, State and ZIP Code | |

| 3. See instructions for codes to use | | | | 4. This application is no. _____ of a set of _____ applications. | 5. No. of Months to Construct |
|---|---|---|---|---|---|
| (a) Service | (b) Type of Use | (c) Class of Service | (d) Nature of Application | | |
| | | | | | |

**6. Complete items 6(a) and (b) if request is to amend, modify or to add MDS booster.**

| (a) Request is for: ☐ Amendment ☐ Add MDS Booster Station ☐ Modification per 47 CFR Section: _____ | (b) File Number | (c) Call Sign |
|---|---|---|
| | | |

**7. Transmit Station Information**

| (a) Station Name: | | | (f) Antenna Structure Height: | (g) Building Height: | (h) Ground Elevation: |
|---|---|---|---|---|---|
| (b) Street Address: | | | (i) Service Area | (j) Latitude: | (k) Longitude: |
| (c) City: | (d) State: | (e) County: | | | |

**8. Frequency Path Information**

| (a) Frequency & Polarization | (b) Xmtr. No. | (c) Receive Station Name | (d) Operation Code | (e) Line Loss | Transmitting Antenna | | | | Receiving Antennas | | | | (n) Act. Code |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | Primary | | Diversity | | Primary | | Diversity | | |
| | | | | | (f) Code | (g) Height | (h) Code | (i) Height | (j) Code | (k) Height | (l) Code | (m) Height | |
| | | | | | | | | | | | | | |
| | | | | | | | | | | | | | |
| | | | | | | | | | | | | | |
| | | | | | | | | | | | | | |
| | | | | | | | | | | | | | |
| | | | | | | | | | | | | | |

**9. Receive Station Information**

| (a) Station Name | (b) State | (c) Call Sign | (d) Type Fac. | (e) Path Dist. (Km) | (f) Path Azimuth | (g) Latitude | (h) Longitude | (i) Ground Elevation | (j) Structure Height | (k) Bldg. Height | (l) Act. Code |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |

**10. Transmitter Information**

| (a) Xmtr. # | (b) Xmtr. Code | (c) Qty. | (d) Name of Manufacturer | (e) Type or Model Number | (f) Power Output/EIRP (Watts) | (g) Emission Designator | (h) Freq. Stability | (i) Module Code | (j) Act. Code |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |

**11. Antenna Information**

| (a) Antenna Code | (b) Name of Manufacturer | (c) Type or Model Number | (d) Beam Tilt | (e) Azimuth |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |

**12. Site Availability**

(a) Does this application propose a new or relocated station or receive-only station or passive facility? ☐ Yes ☐ No

If "YES," complete items (a) and (b) below. Give site name as listed on page 1 in space provided.

(b) Site secured by (Mark "X" in the appropriate box): Submit lease or option as Exhibit A.

☐ Site Owned ☐ Site Leased ☐ Option to Buy or Lease

☐ Other (Include Explanation as Exhibit A)

(c) Site Name

13. Has the applicant obtained reasonable assurance that it can use the proposed site? ☐ Yes ☐ No

**14. Antenna Structure Statement**

(a) Status of Structure (Check One)

☐ New Structure

☐ Exisiting Structure, Height Not Increased

☐ Existing Structure, Height Increased

(b) Overall Heights of Antenna Structure (Feet)

(Heights should include obstruction light, if required, and any other surmounting appurtenance.)

| Above Ground Level | | Site Elevation | | Above Mean Sea Level |
|---|---|---|---|---|
| _____ | + | _____ | = | _____ |

(c) Will proposed transmitting antenna be supported by the antenna structure of any other radio station?

☐ Yes ☐ No If "YES," give Call Sign: _____

(d) Distance from transmitting antenna structure to nearest runway of nearest aircraft landing area (Miles):

Submit as Exhibit No. ____, a vertical profile sketch for all antenna supporting structures and passive facilities involved in this application.

*(See Part 21 of the Rules for specific requirements.)*

(e) Is the antenna mounted on an existing structure or building which currently bears lighting and markings prescribed by FCC Rules Part 17?

☐ Yes ☐ No

If "YES," give FCC Antenna Tower No. or FAA Aeronautical Study No. if known: _____

(f) Has FAA been notified?

☐ Yes If "YES," answer items (f) 1-3.

☐ No

1. Date Filed *(Month-Day-Year)*
2. Name Under Which Filed
3. Regional Office Where Filed *(City, State)*

(g) Submit as Exhibit No. ____ a list of any natural formation or existing man-made structure (hills, trees, water tanks, tower, etc.) that applicant believes would tend to shield the antenna structure from aircraft and thereby minimize the aeronautical hazard of the antenna structure.

**15. Environmental Impact** ☐ Yes ☐ No

Does this proposal have a significant environmental impact, thus requiring an environmental assessment under the Commission's environmental rules (Part 1, Subpart 1)?

If "YES," submit as Exhibit No. _____ a statement addressing the environmental impact of this facility, as required by the Rules.

If "NO," submit as Exhibit No. _____ an explanation of why the applicant believes an environment assessment is not required.

**16. Geostationary Satellite Orbit** ☐ Yes ☐ No

Does this application propose installation or re-orientation of a transmitting antenna to operate with a frequency in the 5925-6425 MHz band and aimed within 2 degrees of the geostationary satellite orbit?

If "YES," submit ad Exhibit No. _____ a justification for waiver as required by Part 21 of the Rules.

**17. Quiet Zone** ☐ Yes ☐ No

Does this application propose a new or modified station for any "quiet zone" or other area where radio use is restricted under the Commission's Rules?

If "YES" , specify the following:

| Authority Notified | Date of Notification |
|---|---|
| | |

**18. Multipoint Distribution Service (MDS) or Digital Electronic Message Service (DEMS).**

Mark "X" in the appropriate box to indicate whether service involves the following.

☐ MDS (answer items (a), (b), (c), (d), (e) and (f) below)
☐ DEMS (answer items (a) and (b) below).

(a) Does this application propose a new or relocated station, or a major amendment under Section 21.23(c)(2) of the Rules? ☐ Yes ☐ No

If "YES," submit as Exhibit No. ___ an analysis of the potential for harmful interference with other authorized or previously proposed stations located within fifty miles which utilize, or would utilize, the same frequency or an adjacent potentially interfering frequency.

(b) Does this application involve a new or relocated station whose transmitter, control point and/or studio will be located at different addresses? ☐ Yes ☐ No

If "YES," submit as Exhibit no. ___ the address(es) of the control point and/or studio and the means by which they are to be connected to the transmitter.

(c) Does this application propose a new station? ☐ Yes ☐ No

If "YES," submit as Exhibit No. ___ a list of the program input facilities, (e.g., video tape machine, TV camera, Projectors, facsimile devices, etc.) and other studio equipment to be provided.

(d) Applicant proposes to provide service3 as: ☐ Common Carrier ☐ Non-common carrier

(e) Does this application propose a new or modified station for which there is an ownership interest in, control by, affiliation with, or leasing arrangement with a cable television company? ☐ Yes ☐ No

If "YES," submit as Exhibit No. ___ a description of the releationship and a map depicting overlap of the boundaries of cable franchise area and MDS station's protected service area, if any.

(f) Is this an application for a Multichannel MDS station? ☐ Yes ☐ No

(1) If "YES," attach as Exhibit I certification of service on ITFS station licensees with transmitters within 50 miles.

(2) If "YES," proposed transmitter will be located (check one):

☐ within the borders of any MSA or NECMA. Give first name of MSA or NECMA: _____
☐ within 15 miles of the border of any MSA or NECMA. Give first name of MSA or NECMA: _____
☐ more than 15 miles from the borders of any MSA or NECMA.

(3) (i) Do you claim a minority preference? ☐ Yes ☐ No

(ii) Do you claim full diversity preference (no media mass communication)? ☐ Yes ☐ No

(iii) Do you claim partial diversity preference (1,2, or 3 media of mass communications)? ☐ Yes ☐ No

**19. Radio Station Maintenance Center**

Give the local address (not the P.O. Box) and telephone number of the maintenance center or person responsible for the technical operation of the station. Submit as Exhibit No. ___, a demonstration of maintenance procedures to insure good public service, including malfunction notification procedures and malfunction response time.

| Location: | Telephone Number: |
|---|---|
| | |

**20. Rule Waivers and Exceptions.**

Is the proposal contained in this application inconsistent with any of the Commission's Rules? ☐ Yes ☐ No

If "YES", submit as Exhibit No. _____ all requests for waivers or exceptions, including justification and supporting showings.

**21. Frequency Coordination (Only Local TV Transmission Service and Fixed Stations in the Point-to-Point Microwave Service, Including Temporary Fixed)**

Has prior frequency coordination or notification of this proposal been completed pursuant to 47 CFR 21.100(d)? ☐ Yes ☐ No

If "YES", submit as Exhibit No. _____, a list of the entities notified and the notification and response dates.

If "NO", submit as Exhibit No. _____, an explanation of why coordination or notification has not been completed or why the applicant believes that coordination or notification is not required.

**22. Public Interest**

Submit as Exhibit No. _____, a complete statement setting forth the purpose of the proposal and facts which show how it will be in the public interest and will satisfy needs for service. If the proposed facilities are to include multiplexed radio channel(s), specify the type and quantity of circuits or channels involved and projected traffic loading.

**23. Section 214 Authorization**

If authorization for radio channel multiplexing pursuant to Section 214 of the Communications Act is being (or has been) requested, identify application that is being or has been requested, with the following:

(a) Date filed or estimated filing date:

(b) FCC file number if known:

**24. Ownership and Control of Facilities**

(a) Mark "X" in the appropriate box to disclose the applicant's relationship to the proposed facilties (exclusive of site). Note: Applicant, in this context, includes any commonly owned company.

☐ Owner (including installment equipment purchases) ☐ Lessee ☐ Other Submit as Exhibit No. ___ an explanation of the applicant's relationship to other.

(b) Are there any agreements or understandings existent or under negotiation which affect the ownership or control of the facilities proposed herein, or any right or interest therein by any person not party to this application? ☐ Yes ☐ No

If "YES," submit as Exhibit No. ___, a statement explaining such understandings or agreements.

(c) Are there any agreements or understandings existent or under negotiation which affect the management or operation of the facilities proposed herein? ☐ Yes ☐ No

If "YES," submit as Exhibit No. ___, a copy of such agreement or understanding and a demonstration of control.

**25. State or Local Franchises** ☐ Yes ☐ No

Does state or local law require any franchise or other authorization to maintain or render the services proposed herein?

If "YES," submit as Exhibit No. ___ (except MDS or DEMS) a copy of franchise or statement of state or local requirement of prior FCC authorization.

**26. Subscriber Affiliation** ☐ Yes ☐ No

Are the Point-to-Point Microwave Service, including Temporary Fixed, facilities proposed herein intended to provide primarily to relay broadcast television signals to specific subscribers who are related or affiliated in any manner, directly or indirectly, with the applicant?

If "YES," submit as Exhibt No. __ a list of all such subscribers served by the microwave system involvedin this proposal and include the following: (a) whether each subscriber is related or unrelated to the applicant; and (b) the number of channels provided to each, identifying existing and proposed service.

**27. Tariff** ☐ Yes ☐ No

Are the charges for the proposed service contained in a tariff filed with the FCC or a state commission?

If "YES," identify said tariff: _____

If "NO," submit as Exhibit No. _____ (except noncommon carrier licensees), a copy of the proposed schedule of charges and general terms of service. If an existing tariff is to be amended, only the modifications involving significant changes need be set forth.

**28. Construction Cost.** Provide estimate of cost to establish facilities proposed in this application.

(NOTE: For a set of related Point-to Point Microwave applications, give total estimated cost.)

Engineering and design $ _____

Application (including preparation and prosecution of application, legal fees, etc.) _____

Estimated cost to establish the facilities proposed in this application (including equipment and site acquisition) _____

TOTAL $ _____

**29. Licensee Qualification Report** ☐ Yes ☐ No

Does the applicant have a current "Licensee Qualification Report," FCC 430 form on file for this service?

If "YES," indicate the date of such filing and FCC Division. _____

If "NO," complete questions (a) through (c) below.

(a) Transferee is: (Check one)

☐ Individual (or Sole Proprietor) ☐ Partnership ☐ Corporation
☐ Unincorporated Association

(b) Attach as Exhibit No. _____ a statement of applicant's principal business.

(c) Attach as Exhibit No. _____ a statement of the businesses, employment, or activities, other than communications in which individual applicant, each member if a partnership, and all principals if a corporation, are engaged, giving: (1) nature of activity; (2) location of activity; and (3) hours devoted to each activity.

d. Is individual applicant, or if partnership, a citizen of the United States? ☐ Yes ☐ No

e. Is applicant or any party to this application a representative of an alien or of a foreign government? ☐ Yes ☐ No

f. If applicant is a partnership, attach as Exhibit No. _____ one copy, properly certified, of the partnership agreement, or if oral, complete details thereof. ☐ Yes ☐ No

g. If applicant is a Corporation (including joint stock companies) or Association, answer the following questions:

(1) Under laws of what State or Country is it organized? _____

(a) Attach as Exhibit No. _____ a certified copy of the Articles of Incorporation (charter) if not heretofore on file with the Commission. If previously filed, state date and FCC Division.

(b) Attach as Exhibit No. _____ the names, addresses and percentages of stock held by all principals of the corporation and by all stockholders owning and/or voting 10 percent or more of applicant's stock.

(2) Is any director or officer an Alien? If "YES," in Exhibit No. _____ give name and position of each. ☐ Yes ☐ No

(3) Is more than one-fifth of the capital stock owned of record, or may it be voted, by aliens or their representatives, or by a foreign government or representatives thereof, or by a corporation organized under the laws of a foreign government? ☐ Yes ☐ No

(4) Is applicant directly or indirectly controlled by any other corporation? ☐ Yes ☐ No

If "YES," give in Exhibit No. _____ the names and addresses of all such controlling corporations to and incuding organizations having final control and furnish for each all the information requested in g. (1)-(3) above.

(5) Is applicant directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens? ☐ Yes ☐ No

(6) Is more than one-fourth of the capital stock of any controlling corporation owned of record, or may it be voted by aliens or their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign government? ☐ Yes ☐ No

h. (1) Is applicant directly or indirectly, through stock ownership, contract, or otherwise, interested in the ownership or have control of any other radio stations? ☐ Yes ☐ No

If "YES," in Exhibit No. _____ give call sign and service, location, and name of permitee(s) or licensee(s).

(2) Has applicant in the past fifteen years been directly or indirectly interested in the ownership or control of any radio stations other than those referred to under (1)? ☐ Yes ☐ No

If "YES," in Exhibit No. _____ give call sign and service, location, and name of permitee(s) or licensee(s).

i. Has applicant or any party to this application had any station authorization revoked or had any application for construction permit, license, or renewal denied by this Commission? ☐ Yes ☐ No

If "YES," attach as Exhibit No. _____ a statement relating all the pertinent circumstances.

j. (1) Has the applicant been finally adjudged guilty by a Federal Court or unlawfully monopolizing, or attempting to monopolize, radio communication directly or indirectly through control of manufacture or sale of radio apparatus, exclusive traffic arrangements, or any other means, or unfair methods of competition? ☐ Yes ☐ No

j. (2) Has the applicant, or any party to this application, or any person directly or indirectly controlling the applicant ever been convicted of a crime for which the penalty imposed was a fine of $500 or more, or an imprisonment of six months or more? ☐ Yes ☐ No

If "YES," attach as Exhibit No. _____ a statement relating the facts.

j. (3) Is applicant directly or indirectly controlled by any party finally adjudged guilty as above stated? ☐ Yes ☐ No

k. Is applicant, or any person directly or indirectly controlling the applicant, presently a party in any matter referred to in items i and j? ☐ Yes ☐ No

If "YES," attach as Exhibit No. _____ a statement relating the facts?

l. (1) Is applicant personally familiar with the provisions of the Commission's Rules governing the service which is the subject of this application? ☐ Yes ☐ No

l. (b) Has applicant examined the subject facilities and determined that construction and operation is in compliance with current authorizations and the Commission's Rules?

☐ Yes ☐ No

m. Attach as Exhibit No. _____ a statement explaining how the construction and/or operation of the station will be in the public convenience, interest, or necessity.

**30. List the common carrier and satellite radio services in which filer has applied or is a current licensee or permittee:**

**31. Additional Exhibits.**

Provide any other information, in attached exhibits, that may be required by the Commission's Rules not otherwise addressed in this form. Identify any such exhibits below.

| Exhibit No. | Identity | Exhibit No. | Identity |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |

**32. Certification of Person Responsible for Preparing Engineering Information submitted in this Application.**

I hereby certify that I am the technically qualified person responsible for preparation of the engineering information contained in this application, that I am familiar with Part 21 of the Commission's Rules, that I have either prepared or reviewed the engineering information submitted in this application, and that it is complete and accurate to the best of my knowledge.

| Date | Type or Print Name of Person Signing | Signature |
|---|---|---|
| | | |

Address (Number, Street, City, State and ZIP Code)

**33. Certification of Applicant.**

**By checking yes, the applicant certifies that, in the case of an individual applicant, he or she is not subject to a denial of federal benefits that includes FCC benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862, or, in the case of a non-individual applicant (e.g., corporation, partnership or other unincorporated association), no party to the application is subject to a denial of federal benefits that includes FCC benefits pursuant to that Section. For the definition of a "party" for these purposes, see 47 C.F.R. Section 1.2002(b).**

☐ Yes ☐ No

The applicant has, or has reasonable assurance that it will have, the ability to meet the expected cost of constructing the facilities within the construction period and the estimated operating expenses for twelve months. I am familiar with Part 21 of the Commission's Rules and have either prepared or reviewed the information submitted in this application. The applicant waives any claim to the use of any particular frequency of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a construction authorization in accordance with this application. All statements made in the attached exhibits are a materail part hereof and are incorporated herein as if set out in full in this application. The undersigned, individually and for the applicant, hereby certifies that the statements made in this application are true, complete and correct to the best of the signer's knowledge and belief, and are made in good faith.

| Date | Applicant (Must correspond with that shown on Page 1) | Type or Print Name of Person Signing |
|---|---|---|
| | | |

| Signature | Title (Position Held by Person Signing) |
|---|---|
| | |

**34. Contact Representative.**

Indicate the name, mailing address, and telephone number of person to contact, if other than applicant.

| Name | Mailing Street Address or P.O. Box, City, State and ZIP Code | Area Code-Telephone No. |
|---|---|---|
| | | |

WILLFUL FALSE STATEMENTS MADE ON THIS APPLICATION ARE PUNISHABLE BY FINE AND IMPRISONMENT [ U.S. Code, Title 18, Section 1001] AND/OR REVOCATION OF ANY STATION LICENSE [U.S. Code, Title 47, Section 312(a)(1)], AND/OR FORFEITURE [U.S. Code, Title 47, Section 503].

FCC 705

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

APPROVED BY OMB
3060-XXXX
EXPIRES XX/XX/XX
Est. Avg. Hrs. Per Response: 7 Hrs.

## APPLICATION FOR CONSENT TO ASSIGNMENT OR FOR TRANSFER OF CONTROL OF RADIO STATION CONSTRUCTION AUTHORIZATION OR LICENSE

FCC 705 is to be used when applying for consent to assignment of radio facilities governed by 47 C.F.R. 21, 23 or 25 or for consent to transfer control of corporation holding common carrier (or noncommon carrier) radio station permit or license under 47 C.F.R. 21, 23 or 25.

FCC 705 consists of two Sections: Section I is the fee portion; Section II is the application portion.

### Instructions for Completing Section I (Fee Portion)

Part I must be completed. If you are applying for concurrent actions which require you to list more than one Fee Type Code, you must also complete Part II. Please type or print legibly. All required blocks must be completed or application/filing will be returned without action.

1. "Applicant Name" - Enter the name (last, first, middle initial) of the applicant. If company, enter name which is used commercially.
2. "Mailing Address (Line 1)" - Enter the street address or post office box number to which the applicant wishes correspondence sent.
3. "Mailing Address (Line 2)" - This line may be used for further identification of the address if additional space is required.
4. "City" - Enter the name of the city associated with the given street address.
5. "State or Country" - Enter the appropriate two-digit state abbreviation as prescribed by the U.S. Postal Service. If address is foreign, enter the appropriate country name here.
6. "ZIP Code" - Enter the appropriate five or nine-digit ZIP code prescribed by the U.S. Postal Service.
7. "Call Sign or Other FCC Identifier" - Enter an applicable call sign or unique FCC Identifier, if any, as shown on your attached application. If applying for service affecting more than one call sign, enter one call sign only.
8. Column (A), "Fee Type Code" - Enter correct Fee Type Code(s) from the Common Carrier Services Fee Filing Guide. Inaccurate or erroneous Fee Type Codes may result in your application or filing being returned to you without further processing.
9. Column (B), "Fee Multiple" - Your submission may request action with respect to more than one station, license, frequency or party and can be submitted together with one check if they meet specific conditions. This column is used only if a multiple, i.e., two or more, is being applied for. Refer to the Common Carrier Services Fee Filing Guide for additional information.
10. Column (C), "Fee Due for Fee Type Code in Column (A)" - Enter in this block the amount of the fee associated with the Fee Type Code shown in Column (A) (times (x) the fee multiple, if required).
11. "Total Amount Remitted With This Application or Filing" - Enter the total of lines (1) through (5) of Column (C). This amount should equal the amount of your check or money order. We will not accept multiple checks.

### How to Submit Applications

An original and one copy of completed application must be submitted. Required copies of applications should be clearly identified as "duplicate copy" and placed behind the original package. A copy of an application submitted for receipt purposes only should be placed at the bottom of the submission. Extraneous material and extra copies should be avoided at all times. Failure to abide by these instructions will delay the processing of your submission or will result in return of the application without action.

### Mailing Instructions

Completed applications should be mailed to the proper address as shown in the Common Carrier Services Fee Filing Guide. Applications which are properly addressed to the appropriate P.O. Box number may also be hand delivered to the following address: **Federal Communications Commission, c/o Mellon Bank, Three Mellon Bank Center, 525 William Penn Way, 27th Floor, Room 153-2713, Pittsburgh, Pennsylvania, (Attention: Wholesale Lockbox Shift Supervisor).**

Applications received before midnight on a normal business day will receive that day's date as the receipt date. Deliveries made after midnight on Fridays will not be "officially" receipted until the next Monday. Applications received on weekends and government holidays are dated the next regular business day. A single check, bank draft or money order made payable to the **FEDERAL COMMUNICATIONS COMMISSION** and demoninated in U.S. dollars and drawn upon a U.S. financial institution must be included with each application requiring a fee. No postdated, altered or third-party checks will be accepted. **DO NOT SEND CASH.**

### General Instructions for Completing Section II (Application Portion)

Section II is the application portion, which consists of four parts: Part I - to be completed by Assignor or Transferor; Part II - to be completed by Transferee; Part

III - to be completed by Assignee; and Part IV - to be completed by Assignee or Transferee.

1. Before the application portion is prepared, the applicant should refer to the applicable rules and regulations of the Commission which govern the radio facility (Title 47, Code of Federal Regulations (C.F.R.) Parts 1, 21, 23 or 25) copies of which may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. Items 32 and 33 apply to 47 C.F.R. 21 applicants only.

2. 47 C.F.R Parts 21, 23 or 25 may require information to be filed with the application in addition to that specified in the application form. Applicants should make every effort to file a complete application in compliance with the Rules. Failure to do so can result in rejection or return of the application or a delay in the processing of the application. The Commission may require the furnishing of additional information as it deems necessary in the consideration of the application.

3. One submission may be filed to request assignment of a group of station licenses provided specific requirements are met. (see 47 C.F.R. Parts 21, 23 or 25 for details).

4. Number each document or statement required to be filed as Exhibit consecutively. Enter the numbers in the space provided in the items of the form. When exhibit is not required, enter "X" in the blank form.

5. Approval of this application is not to be construed as as modification of outstanding authorization.

6. Item 3. All applicants are to complete Item 3, columns (a), (b) and (c). Services which may be listed in column (c) for Part 25 include: Transmit Earth Stations; Satellite Systems (column (d) does not apply); Small Transmit/Receive Earth Station; Receive Only Earth Stations; and Space Stations (column (d) does not apply). Part 21 services include: Point-to-Point Microwave Radio; Multipoint Distribution; Local Television Transmission; Digital Electronic Message; and Fixed Subsidiary Communications Authorization. The service for Part 23 is International Fixed Public Radio.

Column (d) is to be completed only by applicants requesting transfer of control for authorizations issued in the domestic satellite services (under 47 CFR 25) for each authorization listed.

**Notice:** The solicitation of personal information requested in this form is authorized by the Communications Act of 1934, as amended. The Commission will use the information provided in this form to determine whether grant of this application is in the public interest. In reaching that determination, or for law enforcement purposes, it may become necessary to refer personal information contained in this form to another government agency. In addition, all information provided in this form will be available for public inspection. If information requested on the form is not provided, processing of the application may be delayed or the application may be returned without action pursuant to the Commission rules. Your response is required to obtain the requested authority.

Public reporting burden for this collection of information is estimated to average 7 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (3060-XXXX), Washington, DC 20503.

The foregoing Notice is required by the Privacy Act of 1974, P.L. 93-579, December 31, 1974, 5 U.S.C. 552a(eX3) and the Paperwork Reduction Act of 1980, P.L. 96-511, December 11, 1980, 44 U.S.C. 3504(cX3XC).

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Approved by OMB
3060-XXXX
Expires XX/XX/XX
Est. Avg. Hrs. Per Response: 7 Hrs.

FOR FCC USE ONLY

# FCC 705 – APPLICATION FOR CONSENT TO ASSIGNMENT OR FOR TRANSFER OF CONTROL OF RADIO STATION CONSTRUCTION AUTHORIZATION OR LICENSE

READ INSTRUCTIONS BEFORE COMPLETING

## SECTION I (FEE PORTION)

PART I

APPLICANT NAME (Last, first, middle initial)

MAILING ADDRESS (Line 1) (Maximum 35 characters - refer to Instructions for Completing Section I, no. 2.

MAILING ADDRESS (Line 2) (if required) (Maximum 35 characters)

CITY

| STATE OR COUNTRY (if foreign address) | ZIP CODE | CALL SIGN | OTHER FCC IDENTIFIER |
|---|---|---|---|
| | | | |

Enter in Column (A) the correct Fee Type Code for the service you are applying for. Fee Type Codes may be found in the Common Carrier Services Fee Filing Guide. Enter in Column (B) the Fee Multiple, if applicable. Enter in Column (C) the result obtained from multiplying the value of the Fee Type Code in Column (A) by the number entered in Column (B), if any.

| | (A) FEE TYPE CODE | (B) FEE MULTIPLE (if required) | (C) FEE DUE FOR FEE TYPE CODE IN COLUMN (A) | FOR FCC USE ONLY |
|---|---|---|---|---|
| (1) | | | $ | |

PART II – To be used only when you are requesting concurrent actions which result in a requirement to list more than one Fee Type Code.

| | (A) FEE TYPE CODE | (B) FEE MULTIPLE (if required) | (C) FEE DUE FOR FEE TYPE CODE IN COLUMN (A) | FOR FCC USE ONLY |
|---|---|---|---|---|
| (2) | | | $ | |
| (3) | | | $ | |
| (4) | | | $ | |
| (5) | | | $ | |

ADD ALL AMOUNTS SHOWN IN COLUMN C, LINES (1) THROUGH (5), AND ENTER THE TOTAL HERE. THIS AMOUNT SHOULD EQUAL YOUR ENCLOSED REMITTANCE. →

| TOTAL AMOUNT REMITTED WITH THIS APPLICATION OR FILING | FOR FCC USE ONLY |
|---|---|
| $ | |

**SECTION II (Application Portion)**

| FCC Use Only | |
|---|---|
| Service | File No. and Call Sign |

**PART I – TO BE COMPLETED BY ASSIGNOR OR TRANSFEROR**

1. Name and Mailing Street Address or P.O. Box, City, State and ZIP Code **of Permittee or Licensee Appearing on Commission's Records**

2. Application is for:

☐ Assignment ☐ Transfer of Control

3. List here the Permits or Licenses For Which Assignment or Transfer of Control is Sought in this Application

| (a) Call Sign | (b) File No. | (c) Service | (d) No. of Stations |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |

4. Name and Street Address or P.O. Box, City, State and ZIP Code of **Assignor or Transferor**

5. Name and Street Address of P.O. Box, City, State and ZIP Code of **Assignee or Transferee**

Complete items 6 – 8, if application is for transfer of control. Otherwise, skip to Item 9.

6. Permittee or Licensee represents: (check one)

☐ That there is attached to this application as Exhibit No. _____ a certified copy of the Articles of Incorporation (charter) of the permittee or licensee company.

☐ That there is now on file with the Commission a current certified copy of the Articles of Incorporation of the permittee or license company. Where Filed: Date Filed:

7(a) Transfer of Control will be accomplished by: (check one)

☐ Sale or other transfer or assignment of stock (Complete 6(b) ☐ Other (e.g., voting trust agreement, management contract, court order, etc.)

b. Transfer or Assignment of Stock

| Shares | Number of Shares | Classification (common, preferred, etc.) |
|---|---|---|
| Shares to be Transferred . . . . . | | |
| Shares issued and outstanding . . . . . | | |
| Shares authorized . . . . . | | |

8. Attach as Exhibit No. _____ a statement on how control is to be transferred and copies of any pertinent contracts, agreements, instruments, certified copies of court orders, etc.

**9. CERTFICATION**

The undersigned, individually and for the permittee or licensee represents that all the attached exhibits pertinent to Part I are a material part hereof and are incorporated herein as if set out in full in this application, and certifies that all the statements made in Part I of this application are true, complete and correct to the best of his(her) knowledge and belief.

The undersigned represents that the license will not be assigned or that stock will not be delivered, and that control will not be transferred, until the Commission's consent has been received, but that transfer must be completed within 60 days if Commission consents.

I request that the Commission grant its written consent to the foregoing assignment or transfer of control.

| **Date** | **Printed or Typed Name of Permittee or Licensee (Must agree with Item 1)** |
|---|---|
| **Signature** | **Title (Office Held by Person Signing)** |

**WILLFUL FALSE STATEMENTS MADE ON THIS APPLICATION ARE PUNISHABLE BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001) AND/OR REVOCATION OF ANY AUTHORIZATION (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503).**

**PART II - To be completed by Transferee.**

| Place an "X" in the appropriate column. | YES | NO |
|---|---|---|
| 10. Will transferee propose any of the following changes after the transfer of control is authorized (see instruction 5)? | | |
| a. Changes in the services currently offered?: If "YES," attach as Exhibit No. _____ a brief statement of the proposed changes. | | |
| b. Changes in technical personnel, maintenance or repair of facilities? If "YES," attach as Exhibit No. _____ a description of positions to be changed and specific arrangements for prompt maintenance or repair of facilities. | | |
| c. Changes in the management of personnel responsible for the operation of the station? If "YES" in Exhibit No. _____ describe the manner in which the proposal will operate, and list present positions of responsibility to be changed and proposed positions and division of responsibility, including hours of physical supervision. (When responsibilities are to be divided with any other business, give name and address of owner of each such business and submit copy of working agreement). | | |
| 11. If transferee is a corporation, is stock of transferee to be sold after this consent is issued for any purpose? If "YES," explain purpose in Exhibit No. _____. | | |
| 12. Does transferee now hold any obligations of licensee corporation? If "YES," in Exhibit No. _____ describe the obligations, methods by which acquired, and the dates on which they were obtained. | | |
| 13. Does local or state law require any authorization to transfer the control of the facilities and/or operations involved herein? If "YES," attach as Exhibit No. _____ a single certified copy of such authorization. | | |

**PART III - To be Completed by Assignee**

| 14(a) State assignee's relation to station: ☐ Owner ☐ Lessee ☐ Other | (b) Identify owner, if assignee is not owner: |
|---|---|

(c) Attach as Exhibit No. _____ a copy of the agreement showing assignee's interest in station, if not on file with the Commission, or-if assignee is not owner. If previously filed, state date and FCC Division:

(d) Attach as Exhibit No. _____ a statement of the nature of assignee's interest in use and control of station, if assignee is neither owner or lessee.

15. Will assignee have absolute control of station, both as to physical operation and service provided?
☐ Yes ☐ No If "NO," attach as Exhibit No. _____ a copy of any contract which may affect assignee's right to do so.

16. Attach as Exhibit No. _____ a statement showing assignee's financial responsibility with respect to construction and/or operation of station.

17. Attach as Exhibit No. _____ a statement indicating whether stock is to be sold for purpose of raising money to construct and/or operate station.

18. The assignor's most recent applications for authorization are to be considered as part of this application, and the truth of the statements therein contained is hereby reaffirmed by the assignee, except insofar as the contrary expressly appears herein, and in the following particulars:

**Part IV - To be completed by Assignee or Transferee.**

19. Transferee is: (Check one)
☐ Individual (or Sole Proprietership) ☐ Partnership ☐ Corporation ☐ Unincorporated Association

20. Attach as Exhibit No. _____ a statement of assignee's or transferee's principal business.

21. Attach as Exhibit No. _____ a statement of the businesses, employment, or activities, other than communications in which individual assignee or transferee, each member if a partnership, and all principals if a corporation, are engaged, giving: (a) nature of activity; (b) location of activity; and (c) hours devoted to each activity

| Part IV (Continued) Place an "X" in the appropriate column. | YES | NO |
|---|---|---|
| 22. Is individual assignee or transferee, or if partnership each member of partnership, a citizen of the United States? | | |
| 23. Is assignee or transferee or any party to this application a representative of an alien or of a foreign government? | | |
| 24. If assignee or transferee is a partnership, attach as Exhibit No. _____ one copy, properly certified, of the partnership agreement, or if oral, complete details thereof. | | |
| 25. If assignee or transferee is a Corporation (including joint stock companies) or Association, answer the following:<br>a. Under laws of what State or Country is it organized? _____<br>(1) Attach as Exhibit No. _____ a certified copy of the Articles of Incorporation (charter) if not heretofore on file with the Commission. If previously filed, state date and FCC Division.<br>(2) Attach as Exhibit No. _____ the names addresses and percentages of stock held by all principals of the corporation and by all stockholders owning and/or voting 10 percent or more of assignee's or transferee's stock. | | |
| b. Is any director or officer an Alien? If "YES," in Exhibit No. _____ give name and position of each. | | |
| c. Is more than one-fifth of the capital stock owned of record, or may it be voted, by aliens or their representatives, or by a foreign government or representatives thereof, or by a corporation organized under the laws of a foreign government? | | |
| d. Is assignee or transferee directly or indirectly controlled by any other corporation?<br>If "YES," give in Exhibit No. _____ the names and addresses of all such controling corporations to and including organizations having final control and furnish for each all the information requested in 23 a through c above. | | |
| e. Is assignee or transferee directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens? | | |
| f. Is more than one-fourth of the capital stock of any controlling corporation owned of record, or may it be voted by aliens or their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign government? | | |
| 26 (a) Is assignee or transferee directly or indirectly, through stock ownership, contract, or otherwise, interested in the ownership or have control of any other radio stations?<br>If "Yes," in Exhibit No. _____ give call sign and service, location, and name of permitee(s) or licensee(s). | | |
| (b) Has the assignee or transferee in the past fifteen years been directly or indirectly interested in the ownership or control of any radio stations other than those referred to under (a) ?<br>If "Yes," in Exhibit No. _____ give call sign and service, location, and name of permitee(s) or licensee(s). | | |
| 27. Has assignee or transferee or any party to this application had any station authorization revoked or had any application for construction permit, license, or renewal denied by this Commission?<br>If "Yes," attach as Exhibit No. _____ a statement relating all the pertinent circumstances. | | |
| 28 (a) Has the assignee or transferee been finally adjudged guilty by a Federal Court of unlawfully monopolizing, or attempting to monopolize, radio communication directly or indirectly through control of manufacture or sale of radio apparatus, exclusive traffic arrangements, or any other means, or of unfair methods of competition? | | |
| 28 (b) Has the assignee or transferee, or any party to this application, or any person directly or indirectly controlling the assignee or transferee ever been convicted of a crime for which the penalty imposed was a fine of $500 or more, or an imprisonment of six months or more?<br>If "YES," attach as Exhibit No. _____ a statement relating the facts. | | |
| 28 (c) Is assignee or transferee directly or indirectly controlled by any party finally adjudged guilty as above stated? | | |
| 29. Is assignee or transferee, or any person directly or indirectly controlling the assignee or transferee, presently a party in any matter referred to in items 25 and 26?<br>If "YES," attach as Exhibit No. _____ a statement relating the facts. | | |
| 30 (a) Is assignee or transferee personally familiar with the provisions of the Commission's Rules governing the service which are the subject of this application? | | |
| (b) Has assignee or transferee examined the subject facilities and determined that construction and operation is in compliance with current authorizations and the Commission's Rules? | | |
| 31. Attach as Exhibit No. _____ a statement explaining how the construction and/or operation of the station will be in the public convenience, interest, or necessity. | | |
| 32. Attach as Exhibit No. _____ a complete statement, setting forth facts which show how the instant proposal will be in the public interest, and disclosing all relationships, affiliations or connections between the assignee or transferee and current or prospective subscribers. The statement should contain the names of any common stockholders, officers, directors, employees or individuals closely related to the managment or control of the facilities of the assignee or transferee and any subscriber. | | |

| Part IV (Continued) | | |
|---|---|---|
| Place an "X" in the appropriate column. | YES | NO |
| 33. Is assignee or transferee directly or indirectly interested in or affiliated with any entity or person engaged in the business of providing a public land line message telephone service?<br>If "YES," and assignee or transferee is not a land line telephone carrier, attach as Exhibit No. _____ a statement relating the facts. | | |
| 34. If assignment or transfer of control involves any Multipoint Distribution Service (MDS or MMDS) authorizations, is assignee or transferee directly or indirectly interested in or affiliated with, or does assignee or transferee have leasing arrangements with a cable television company?<br>If "YES," submit as Exhibit No. _____ a description of the relationship and a map showing overlap of boundaries of cable franchise area and MDS station's protected service area, if any. | | |
| 35. If assignment involves any authorizations for Part 21 stations, answer (a), (b), and (c) below:<br>(a) Does authorization involve facilities that have not been constructed? | | |
| If "YES," does assignee or transferee represent that it has, or has reasonable assurance that it will have, the ability to meet the expected cost of constructing any such facilities within the construction period, and the estimated operating expenses for twelve months? | | |
| (b) Were facilities authorized following a comparative hearing and have been operated less than one year; or involve facilities that have not been constructed; or involve facilities that were authorized following a random selection proceeding in which the successful applicant received a preference and that have been operated for less than one year? | | |
| 36. Does assignee or transferee acknowledge that, if Commission consents, assignment or transfer of control must be completed within 60 days of date of consent and Commission must be notified by assignee or transferee in writing within 10 days of consummation? | | |

**37. Certification**

By checking yes, the applicant certifies that, in the case of an individual applicant, he or she is not subject to a denial of federal benefits that includes FCC benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862, or, in the case of a non-individual applicant (e.g., corporation, partnership or other unincorporated association), no party to the application is subject to a denial of federal benefits that includes FCC benefits pursuant to that Section. For the definition of a "party" for these purposes, see 47 C.F.R. Section 1.2002(b).

☐ Yes ☐ No

**38. CERTIFICATION**

**The APPLICANT waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. All statements made in th attached exhibits are a material part hereof and are incorporated herein as if set out in full in this application. The undersigned, individually and for the applicant, hereby certifies that the statments made in this application are true, complete and correct to the best of his (her) knowledge and belief, and a made in good faith.**

| WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. code, Title 18, Section 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503). | A. Date | B. Typed Name of Person Signing |
|---|---|---|
| | C. Signature | D. Title (Position Held by Person Signing Application) |



*U.S. Government Printing Office: 1993 — 342-145/80012